IN THE

SUPREME COURT OF THE UNITED STATES

October Term, 1974

No. 74-6593
74-5693

DANIEL WILBUR GARDNER,

Petitioner,

-v-

STATE OF FLORIDA,

Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE SUPREME COURT OF FLORIDA

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Petitioner prays that a writ of certiorari issue to review the judgment of the Supreme Court of the State of Florida entered on February 26, 1975.

CITATION TO OPINION BELOW

The opinion of the Supreme Court of Florida is reported at ___ So.2d ___, Fla. Sup. Ct. No. 45,106 (February 26, 1975) (slip opinion), and is set out in Appendix A hereto, pp. 1a-9a, infra.

JURISDICTION

The judgment of the Supreme Court of the State of Florida was entered on February 26, 1975, and is set out in Appendix A hereto. Jurisdiction of this Court is invoked under 28 U.S.C. § 1257(3), petitioner having asserted below and asserting here deprivation of rights secured by the Constitution of the United States.

QUESTIONS PRESENTED

I. Whether the imposition and carrying out of the sentence of death for the crime of first degree murder under the law of Florida violates the Eighth or Fourteenth Amendment to the Constitution of the United States?

II. Whether nondisclosure of a "confidential" portion of a pre-sentence investigation report to a defendant convicted of a capital crime constitutes a denial of the effective assistance of counsel guaranteed by the Sixth and Fourteenth Amendments to the Constitution of the United States, and of the right to a fair hearing as guaranteed by the Due Process Clause of the Fourteenth Amendment, in a case where the trial judge declines to accept a jury recommendation of a life sentence and instead imposes the death sentence partially on the basis of the pre-sentence report?

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

1. This case involves the Sixth, Eighth and Fourteenth Amendments to the Constitution of the United States.

2. This case also involves the following provisions of the statutes of Florida:

> Fla. Stat. Ann. §755.082 (1974-1975 supp.)
> Penalties for felonies and misdemeanors
> "(1) A person who has been convicted of a capital felony shall be punished by life imprisonment and shall be required to serve no less than twenty-five (25) calendar years before becoming eligible for parole unless the proceeding held to determine sentence according to the procedure set forth in section 921.141 results in findings by the court that such person shall be punished by death, and in the latter event such person shall be punished by death.
> (2) In the event the death penalty in a capital felony is held to be unconstitutional by the Florida Supreme Court or the United States Supreme Court, a person convicted of a capital felony shall be punished by life imprisonment as provided in subsection (1).
> (3) In the event the death penalty in a capital felony is held to be unconstitutional by the Florida Supreme Court or the United States Supreme Court, the court having jurisdiction over a person previously sentenced to death for a capital felony shall cause such person to be brought before the court, and the court shall sentence such person to life imprisonment as provided in subsection (1). . . ."

> Fla. Stat. Ann. §782.04 (1974-1975 supp.) [1/]
> Murder
> "(1)(a) The unlawful killing of a human being, when perpetrated from a premeditated design to effect the death of the person killed or any human being, or when committed by a person engaged in the perpetration of or in the attempt to perpetrate any arson, rape, robbery, burglary, kidnapping, aircraft piracy, or the unlawful throwing, placing, or discharging of a destructive device or bomb, or which resulted from the unlawful distribution of heroin by a person over the age of seventeen (17) years when such drug is proven to be the proximate cause of the death of the user, shall be murder in the first degree and shall constitute a capital felony, punishable as provided in §755.082.
> (b) In all cases under this section the procedure set forth in section 921.141 shall be followed in order to determine sentence of death or life imprisonment.
> (2) When perpetrated by any act imminently dangerous to another and evincing a depraved mind regardless of human life, although without any premeditated design to effect the death of any particular individual, or when committed in the perpetration of or in the attempt to perpetrate any arson, rape, robbery, burglary,

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1/ This section was amended in 1974, and the statutory definition of second degree murder was altered slightly. Florida Laws 1974, c. 74-383, §14 (effective July 1, 1975) enacts a new §782.04, which provides:

> "782.04 Murder
> (1)(a) The unlawful killing of a human being, when perpetrated from a premeditated design to effect the death of the person killed or any human being, or when committed by a person engaged in the perpetration of or in the attempt to perpetrate any arson, rape, sodomy, robbery, burglary, kidnapping, aircraft piracy, or unlawful throwing, placing or discharging of a destructive device or bomb, or which resulted from the unlawful distribution of heroin by a person eighteen years or older when such drug is proven to be the proximate cause of the death of the user, shall be murder in the first degree and shall constitute a capital felony, punishable as provided in chapter 775.
> (b) In all cases under this section the procedure set forth in §921.141 shall be followed in order to determine sentence of death or life imprisonment.
> (2) The unlawful killing of a human being when perpetrated by any act imminently dangerous to another, and evincing a depraved mind regardless of human life, although without any premeditated design to effect the death of any particular individual, shall be murder in the second degree and shall constitute a felony of the first degree, punishable by imprisonment for a term of years not exceeding life or as provided in chapter 755.
> (3) When a person is killed in the perpetration of or in the attempt to perpetrate any arson, rape, sodomy, robbery, burglary, kidnapping, aircraft piracy or unlawful throwing, placing or discharging of a destructive device or bomb by a person other than the person engaged in the perpetration of or in the attempt to perpetrate such felony, the person perpetrating or attempting to perpetrate such felony shall be guilty of murder in the second degree which constitutes a felony of the first degree, punishable by imprisonment for a term of years not exceeding life or as provided in chapter 775.

kidnapping, aircraft piracy, or the unlawful throwing, placing, or discharging of a destructive device or bomb, except as provided in subsection (1), it shall be murder in the second degree and shall constitute a felony of the first degree, punishable by imprisonment in the state prison for life or for such term of years as may be determined by the court.

(3) When perpetrated without any design to effect death, by a person engaged in the perpetration of, or in the attempt to perpetrate any felony other than arson, rape, robbery, burglary, kidnapping, aircraft piracy, or the unlawful throwing, placing, or discharging of a destructive device or bomb, it shall be murder in the third degree and shall constitute a felony of the second degree, punishable as provided in section 775.082, section 775.083, or section 775.084."

Fla. Stat. Ann. §782.07 (1974-1975 supp.)
Manslaughter

"The killing of a human being by the act, procurement or culpable negligence of another, in cases where such killing shall not be justifiable or excusable homicide nor murder, according to the provisions of this chapter, shall be deemed manslaughter and shall constitute a felony of the second degree, punishable as provided in §775.082, §775.083, or §775.084."

Fla. Stat. Ann. §784.02 (1974-1975 supp.)
Punishment for assault

"Whoever commits a bare assault is guilty of a misdemeanor and, upon conviction, shall be guilty of a misdemeanor of the second degree, punishable as provided in §755.082 or §755.083."

Fla. Stat. Ann. §784.03 (1974-1975 supp.)
Punishment for assault and battery

"Whoever commits assault and battery is guilty of a misdemeanor and, upon conviction, shall be guilty of a misdemeanor of the first degree, punishable as provided in §775.082 or §775.083."

1/ Cont'd.

(4) The unlawful killing of a human being when perpetrated without any design to effect death, by a person engaged in the perpetration of or in the attempt to perpetrate any felony, other than any arson, rape, sodomy, robbery, burglary, kidnapping, aircraft piracy or unlawful throwing, placing or discharging of a destructive device or bomb, . . . shall be murder in the third degree and shall constitute a felony of the second degree, punishable as provided in chapter 775."

Fla. Stat. Ann. §784.04 (1974-1975 supp.)
Aggravated assault

"Whoever assaults another with a deadly weapon, without intent to kill, shall be guilty of an aggravated assault, and shall be guilty of a felony of the third degree, punishable as provided in §775.082, §775.083, or §775.084."

Fla. Stat. Ann. §784.06 (1974-1975 supp.)
Assault with intent to commit felony

"Whoever commits an assault on another, with intent to commit any capital felony or felony of the first degree shall be guilty of a felony of the second degree, punishable as provided in §775.082, §775.083, or §775.084. An assault with intent to commit any other felony constitutes a felony of the third degree, punishable as provided in §775.082, §775.083, or §775.084."

2/

Fla. Stat. Ann. §921.141 (1974-1975 supp.)
Sentence of death or life imprisonment for capital felonies; further proceedings to determine sentence

"(1) Separate proceedings on issue of penalty. Upon conviction or adjudication of guilt of a defendant of a capital felony the court shall conduct a separate sentencing proceeding to determine whether the defendant should be sentenced to death or life imprisonment as authorized by section 755.082. The proceeding shall be conducted by the trial judge before the trial jury as soon as practicable. If the trial jury has been waived or if the defendant pleaded guilty, the sentencing proceeding shall be conducted before a jury impaneled for that purpose unless waived by the defendant. In the proceeding, evidence may be presented as to any matter that the court deems relevant to sentence, and shall include matters relating to any of the aggravating or mitigating circumstances enumerated in subsections (6) and (7), of this section. [3/] Any such evidence which the court deems to have probative value may be received, regardless of its admissibility under the exclusionary rules of evidence, provided the defendant is accorded a fair opportunity to rebut any hearsay statements. However, this subsection shall not be construed to authorize the introduction of any evidence secured in violation of the Constitutions of the United States or of the State of Florida. The state and the defendant or his counsel shall be permitted to present argument for or against sentence of death.

(2) Advisory sentence by the jury. After hearing all the evidence, the jury shall deliberate and render an advisory sentence to the court, based upon the following matters:

(a) Whether sufficient aggravating circumstances

2/ Subsection (1) of this statute was amended slightly in 1974 by Fla. Laws 1974, c. 74-379 (effective October 1, 1974) to provide that if through "impossibility or inability" the trial jury is unable to reconvene for a hearing or sentencing, a special jury may be summoned.

3/ The subsection setting forth aggravating circumstances and mitigating circumstances in Fla. Stat. Ann. §921.141 (1974-1975 supp.), however, are numbered, respectively, (5) and (6).

exist as enumerated in subsection (6);

(b) Whether sufficient mitigating circumstances exist as enumerated in subsection (7), which outweigh the aggravating circumstances found to exist, and

(c) Based on these considerations, whether the defendant should be sentenced to life . . . or death.

(3) Finding in support of sentence of death. Notwithstanding the recommendation of a majority of the jury, the court after weighing the aggravating and mitigating circumstances shall enter a sentence of life imprisonment or death, but if the court imposes a sentence of death, it shall set forth in writing its findings upon which the sentence of death is based as to the facts:

(a) That sufficient aggravating circumstances exist as enumerated in subsection (6), and

(b) That there are insufficient mitigating circumstances, as enumerated in subsection (7), to outweigh the aggravating circumstances.

In each case in which the court imposes the death sentence, the determination of the court shall be supported by specific written findings of fact based upon the circumstances in subsection (6) and (7) and upon the records of the trial and the sentencing proceedings. If the court does not make the findings requiring the death sentence, the court shall impose sentence of life imprisonment in accordance with section 775.082.

(4) Review of judgment and sentence. The judgment of conviction and sentence of death shall be subject to automatic review by the Supreme Court of Florida within sixty (60) days after certification by the sentencing court of the entire record unless the time is extended for an additional period not to exceed thirty (30) days by the Supreme Court for good cause shown. Such review by the Supreme Court shall have priority over all other cases and shall be heard in accordance with rules promulgated by the Supreme Court.

(5) Aggravating circumstances. -- Aggravating circumstances shall be limited to the following:

(a) The capital felony was committed by a person under sentence of imprisonment.

(b) The defendant was previously convicted of another capital felony or of a felony involving the use or threat of violence to the person.

(c) The defendant knowingly created a great risk of death to many persons.

(d) The capital felony was committed while the defendant was engaged, or was an accomplice, in the commission of, or an attempt to commit, or flight after committing or attempting to commit, any robbery, rape, arson, burglary, kidnapping, or aircraft piracy or the unlawful throwing, placing, or discharging of a destructive device or bomb.

(e) The capital felony was committed for the purpose of avoiding or preventing a lawful arrest of effecting an escape from custody.

(f) The capital felony was committed for pecuniary gain.

(g) The capital felony was committed to disrupt or hinder the lawful exercise of any governmental function or the enforcement of laws.

(h) The capital felony was especially heinous, atrocious or cruel.

(6) Mitigating circumstances. -- Mitigating circumstances shall be the following:

(a) The defendant has no significant history of prior criminal activity.

(b) The capital felony was committed while the defendant was under the influence of extreme mental or emotional disturbance.

(c) The victim was a participant in the defendant's conduct or consented to the act.

(d) The defendant was an accomplice in the capital felony committed by another person and his participation was relatively minor.

(e) The defendant acted under extreme duress or under the substantial domination of another person.

(f) The capacity of the defendant to appreciate the criminality of his conduct or to conform his conduct to the requirements of law was substantially impaired.

(g) The age of the defendant, at the time of the crime."

Fla. Stat. Ann. §922.09 (1973) Capital cases

"When a person is sentenced to death, the clerk of the court shall prepare a certified copy of the record to the governor. The sentence shall not be executed until the governor issues a warrant, attaches it to the copy of the record, and transmits it to the warden, directing him to execute the sentence at a time designated in the warrant."

Fla. Stat. Ann. §922.10 (1973) Execution of death sentence

"A death sentence shall be executed by electrocution. The warden of the state prison shall designate the executioner. The warrant authorizing the execution shall be read to the convicted person immediately before execution."

Fla. Stat. Ann. §922.11 (1973) Regulation of execution

"(1) The warden of the state prison or a deputy designated by him shall be present at the execution. The warden shall set the day for execution within the week designated by the governor in the warrant.

(2) Twelve citizens selected by the warden shall witness the execution. A qualified physician shall be present and announce when death has been inflicted. Counsel for the convicted person and ministers of the gospel requested by the convicted person may be present. Representatives of news media may be present under regulations approved by the head of the department of general services. All other persons except prison officers and guards shall be excluded during the execution.

(3) The body of the executed person shall be prepared for burial and, if requested, delivered at the prison gates to relatives of the deceased. If a coffin has not been provided by relatives, the body shall be delivered in a plain coffin. If the body is not claimed by relatives, it shall be given to physicians who have requested it for dissection or be disposed of in the same manner as are bodies of prisoners dying in the state prison."

STATEMENT OF THE CASE

This is a petition for a writ of certiorari to review the judgment of the Supreme Court of Florida entered on February 26, 1975, affirming petitioner's first degree murder conviction and death sentence. Petitioner, Daniel Wilbur Gardner, a white man, was sentenced to death on January 30, 1974, in the Circuit Court of the Fifth Judicial Circuit of Florida in and for Citrus County, upon conviction for the murder of his wife, Mrs. Bertha Mae Gardner, a white woman.

The Gardners were married in 1966, when he was 33 and she was 21, R. 13.[4/] Mrs. Gardner's mother, Mrs. Glenda Mae Demney, lived in a trailer owned by petitioner, T. 188, "[r]ight beside", T. 167, the trailer in which the Gardners and their four children lived. On the evening of June 29, 1973, Mrs. Demney and her daughter, who had been drinking beer together, T. 170, took two

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4/ The record in the Florida Supreme Court is not consecutively paginated. Volume I consists of motions, orders and other written documents and is paginated from 1 to 72; citations to these pages will hereinafter be prefaced by "R." Volumes II and III consist of the transcript of the trial and sentencing hearing and are paginated from 1 to 360; citations to these pages will hereinafter be prefaced by "T." A twelve page unpaginated Supplement to Transcript of Record was filed in the Florida Supreme Court on May 8, 1974. See note 15, infra.

of the Gardner children to the home of a relative, T. 169. Mrs. Gardner then proceeded to the Sugar Mill Bar where she apparently stayed for about two hours. T. 169-171. She returned to the Demney trailer about 10:00 p.m. and announced that she was going to look for petitioner, T. 171, and "bring him home," T. 172.

Later that evening, between 11:00 and 11:30 p.m., as Mrs. Demney and a "male friend," T. 172, Mr. Alva "Buckeye" Loenecker, were drinking whiskey and beer together, petitioner suddenly tore the door off the trailer,[5/] rushed in and, without saying anything, T. 173, struck Mrs. Demney on the side of the head, knocking her unconscious, T. 173. He appeared to her to have been drinking but not to be "drunk." T. 176. "Buckeye," who testified that petitioner was "as good a friend as I ever had," T. 185, then "asked him not to do that no more," T. 187, and petitioner responded that "he was going back and beat hell out of his wife and I ["Buckeye"] said 'please don't do that Bill,'" T. 187. "Buckeye" stated that he did not see petitioner beat his wife, ibid., but:

> "I seen her [Mrs. Gardner], she was at the door of the [Gardner] trailer, and he put her down like that there and went to pulling her head, and she said 'please don't hit me no more', it could have been her that said it, now, or could have been the T.V. was playing loud."

Ibid. Petitioner returned briefly to the Demney trailer about a half hour later and appeared to "Buckeye" to want "to jump on

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5/ Mrs. Demney testified that petitioner "broke down the door" "hinges and all," T. 172. "Buckeye" stated that petitioner "jerked the door down and come in," T. 194.

Glenda Mae" Demney again. T. 188. "Buckeye" told him "'Bill you done wrong [to hit Mrs. Demney]', and he said 'yeah, I believe I have'", ibid. Petitioner then returned to his trailer.

Petitioner's half-brother, who lived in a house one hundred and fifty feet away from petitioner's trailer, heard petitioner talking (although not loudly) later that night. T. 203. Petitioner's aunt, who lived less than half a block away from petitioner, was awakened at about 11:30 p.m. by "some bumping, moving furniture" in petitioner's trailer. T. 206.

At about 7:00 a.m. the next morning, June 30, petitioner reappeared at his mother-in-law's trailer. According to Mrs. Demney, he told her "to come over and check on my [Mrs. Demney's] daughter, said My G.D. Daughter, said she wasn't breathing right."[6/] T. 174. Mrs. Demney proceeded to the Gardner trailer and found her daughter's body lying on the bed, naked and covered with bruises. Mrs. Demney stated that petitioner "wanted me to slap her face, call her, and I said 'I will not, I will call her but I won't slap her', and I just touched her and told him he had better call an ambulance." T. 175. Petitioner said nothing, and just "kept mumbling from the front door to the bed room." Ibid. When "Buckeye" entered the trailer a few minutes later, he saw petitioner holding the body of his wife:

6/ "Buckeye", who had spent the night in the Demney trailer, testified that petitioner came to that trailer about 7:00 a.m. "and called me, said something was wrong with his wife . . . . said something has happened to my wife, that I can't get her awake, looks like she has took some dope." T. 189-190.

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> "I seen her, he had her up in his arm and her head over here, and that's all I could see. And he said 'I can't understand why my wife won't wake up, looks like she's' -- said 'have I killed her or is she dead', and I said 'she looks like she is dead', and he asked me to go call the ambulance, and then I sent and got his mother."

T. 190. Petitioner's mother testified that she came immediately to the trailer and said to petitioner, "'Dan, what have you done?', and he says 'I haven't done anything', he says 'I want somebody to get some help'". T. 197. After his mother had her daughter-in-law call an ambulance, she returned to find petitioner weeping on the couch; he said to her "'mom she wouldn't tell me where my babies are and I tried to get her to tell me and she wouldn't so I kept on beating her, she never would tell me where my babies' . . . . . [sic]" T. 198.

Medical tests subsequently indicated that Mrs. Gardner had died from a severe beating and attendant blood loss and internal hemorrhage.[7/] T. 256-259. The autopsy also revealed that at the

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7/ The trial judge, in his "Findings of Fact" made for purposes of sentencing, summarized the pathologists's testimony concerning the injuries Mrs. Gardner's body had sustained:

> "(a) At least one hundred bruises upon her head, both eyes, nose, abdomen, arms, both breasts, chest, back, thighs and legs.
> (b) Large patches of healthy hair pulled from her head as a result of her hair being grabbed, leaving bald spots.
> (c) Abrasions, bruises and contusions to the head as a result of her hair being grabbed and her head pushed against the wall or floor.
> (d) Massive hemorrhage of the scalp, small hemorrhages under the covering of the brain, and contusions of the nose.
> (e) Massive hemorrhage of the pubic area,

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time of her death her blood alcohol content was .19%, indicating a state of intoxication which was almost twice the level defined as "legal" intoxication. T. 267.

The police were summoned, and petitioner was arrested. Shortly before he was placed in the patrol car, he said to his half-brother, "Dave, I guess I really did it this time." T. 204. The police informed petitioner of his constitutional rights, and on the way to the station, petitioner declared "'why would a man do something like that', -- 'why did I do something like that', and . . . [a deputy sheriff] said 'why did you'?" T. 240. Petitioner replied that "his wife had been running around with other people, and said she had been out with his brother, and he said 'that thing has been eating on me', he said 'it was just more than I could stand.'" Ibid.

7/ cont'd.

> including the inner surface of the thigh and the labia of the vulva.
> (f) Bruised and swollen external genitalia.
> (g) Hemorrhage in and around the right adrenal gland and right kidney.
> (h) A large laceration on the perineum extending from the posterior part of the vagina toward the anus.
> (i) Large tears inside the vagina from the outside entrance all the way to the back as far as it could go, caused by a broom stick, bat or bottle.
> (j) A large laceration or tear of the entire right side of the liver.
> (k) The peritoneal cavity or bone located in the pubic area in the lower part of the body, was broken up into small pieces by blunt injury such as being stomped on."

R. 49-50.

Petitioner's jury was instructed that it could find him guilty of first degree murder, second degree murder, third degree murder, or manslaughter, or not guilty. R. 17; T. 299, 315. The jury found petitioner guilty of first degree murder. R. 39; T. 322.

At the sentencing hearing, the State introduced photographs of the deceased's body and rested, waiving closing argument. T. 323-324, 349.

Petitioner testified that he had eaten no food on June 29, and had had two shots of whiskey and five beers in the morning, T. 328-329, had drunk three shots of vodka around noon, T. 330, had spent the early afternoon drinking whiskey in the Sugar Mill Bar, T. 331, had drunk more beer and had then gone to another tavern where he drank until after dark, T. 331-332, had returned to the Sugar Mill where he drank two or three more whiskeys, T. 333. He testified that he met his wife there and that they drank together for awhile and left the bar at about 11:30 p.m., drinking whiskey on the way home. T. 336. He stated that he recalled having an argument with his wife because he wanted to know where the children were and she refused to tell him, T. 338, but he denied beating her (although he admitted "hitting her with the back of my hand", T. 344).

On January 10, 1974, the jury returned an advisory sentencing verdict that "the [m]itigating circumstances do outweigh the aggravating circumstances. We therefore advise the court that a life sentence should be imposed herein upon the defendant by the court." T. 358. See also R. 44.

The trial court ordered a "pre-sentence investigation" of petitioner on January 10. T. 357. Part of this report, R. 49, was made available to petitioner's counsel. The report indicated that petitioner had been arrested on a number of occasions,[8/] but it indicated no prior felony convictions. It contained the statement that:

> "Law enforcement authorities are quite strong in their opinion of the subject, they consider the subject a menace to society. They feel he should not be let to roam the streets for what he did to his wife. They stated that the subject had a long line of assault charges on his wife, that should be taken into count [sic] about this subject."

Supplement to Transcript of Record (filed in Florida Supreme Court on May 8, 1974)(unpaginated).

On January 30, the trial judge announced "Findings of Fact", R. 49-50, and entered a Judgment and Sentence ordering petitioner to be electrocuted. These Findings noted that the jury had returned an "Advisory Sentence" of life imprisonment but concluded that "after carefully considering and weighing the evidence presented during . . . trial and sentencing . . ., the arguments[9/]

8/ This report stated that petitioner had been arrested on the following charges: disorderly conduct and fighting ($25.00 fine); vagrancy (dismissed); "malice mischief" (no disposition shown); "disorderly conduct (drunk)" ($10.00 fine); "drunk"($15.00 fine); "investigation of aggravated assault" (released); assault with intent to commit murder (nolle prosequi entered); passing worthless $25.00 check (restitution and court costs); disorderly conduct ($30.00 fine); assault and battery (dismissed); assault and battery (dismissed). Supplement to Transcript of Record (filed in Florida Supreme Court on May 8, 1974)(unpaginated).

9/ The prosecution made no argument at the sentencing stage, however. T. 349.

of the attorneys as to the sentence to be imposed and reviewing the factual information contained in said pre-sentence investigation," the crime for which petitioner stood convicted "was especially heinous, atrocious or cruel; and that such aggravating circumstances outweighs the mitigating circumstances, to-wit: none." R. 49. As evidence of the "especially heinous, atrocious and cruel acts" committed by petitioner, the Findings recited the injuries to the victim quoted in note 7, supra.

On February 26, 1975, the Supreme Court of Florida affirmed petitioner's conviction and death sentence with two Justices dissenting.[10/] Mr. Justice Ervin while not abandoning his opinion that the Florida capital punishment statute is unconstitutional, see, e.g., State v. Dixon, 283 So.2d 1, 11-23 (Fla. 1973), declared in dissent:

> "This was a crime of passion in a marital setting in which the excessive use of alcohol was a material factor resulting in the homicide. As I read our statutes, this type of crime does not merit the death penalty because the discretion exercised to impose that penalty here extends beyond the discretion the statutes repose in governmental

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10/ On March 17, 1975, the Supreme Court of Florida stayed execution of petitioner's sentence "to and including April 17, 1975 to allow appellant to seek review in the Supreme Court of the United States and obtain any further stay from that Court." On April 7, 1975, Mr. Justice Powell entered an order providing "that the execution and enforcement of the sentence of death imposed upon the petitioner is hereby stayed pending the timely filing and disposition by this Court of a petition for a writ of certiorari."

> officials for such purpose. I do not believe that the statutes contemplate that a crime of this nature is intended to be included in the heinous category warranting the death penalty. A drunken spree in which one of the spouses is killed traditionally has not resulted in the death penalty in this state. There may, of course, be situations where murder of one's spouse would warrant the death penalty pursuant to the statutes, especially where there is a calculated design and premeditation to rid one of his or her spouse; but this case involving a crime of passion in a drunken spree hardly appears covered by the statutes."

Gardner v. State, Fla. Sup. Ct. No. 45,106 (February 26, 1975) (slip op. at 8-9); App. A, infra, at 8a-9a.

HOW THE FEDERAL QUESTIONS WERE RAISED AND DECIDED BELOW

I. Petitioner's Assignment of Error No. 18 in the court below recited that "[t]he court erred in sentencing defendant to death . . . because . . . [the Florida statutes authorizing imposition of the death penalty] contravene the . . . United States Constitution by . . . providing for cruel and unusual punishment." In his brief, petitioner contended that "the procedure by which appellant was condemned to death is unconstitutionally discretionary; and the death penalty is per se cruel and unusual . . . . Furman v. Georgia, 408 U.S. 238 (1972)." Brief of Appellant at 37. A majority of the Florida Supreme Court rejected this claim when it affirmed petitioner's sentence

in an opinion which stated that the Court had "examined and considered the record in light of the assignments of error and briefs filed." Gardner v. State, Fla. Sup. Ct. No. 45,106 (Feb. 26, 1975), slip op. at 3; App. A, infra, at 3a.

II. Petitioner's Assignment of Error No. 12 in the court below recited that "[t]he court erred in rendering its finding of fact in support of the death penalty because the court considered factors not based upon the record of the trial and the sentencing proceedings in contravention of Fla. Stat. §921.141(3)," and his Assignment of Error No. 13 recited that "[t]he court erred in considering the presentence investigation of defendant." In his brief, appellant contended that "[t]he trial court's review and consideration of the p.s.i. report in the case at bar deviated from both Fla. Stat. §921.141 and State v. Dixon, [283 So.2d 1 (Fla. 1973)]." Brief of Appellant at 16. The Florida Supreme Court tacitly rejected this claim when it affirmed petitioner's conviction and sentence in a per curiam opinion. Gardner v. State, Fla. Sup. Ct. No. 45,106 (Feb. 26, 1975); App. A, infra. Dissenting from this opinion, Mr. Justice Ervin declared:

> "What evidence or opinion was contained in the 'confidential' portion of the report is purely conjectural and absolutely unknown to and therefore unrebuttable by Appellant. We have no means of determining on review what role such 'confidential' information played in the trial judge's sentence, and thus I would overturn Appellant's death sentence on the basis of this fundamental error alone."

Id. at 7; App. A, infra, at 7a.

REASONS FOR GRANTING THE WRIT

I. THE COURT SHOULD GRANT CERTIORARI TO CONSIDER WHETHER THE IMPOSITION AND CARRYING OUT OF THE SENTENCE OF DEATH FOR THE CRIME OF FIRST DEGREE MURDER UNDER THE LAW OF FLORIDA VIOLATES THE EIGHTH OR FOURTEENTH AMENDMENT TO THE CONSTITUTION OF THE UNITED STATES.

In order to avoid burdening the Court with lengthy and repetitious matter, petitioner adopts the "Reasons for Granting the Writ" section of the Petition for Writ of Certiorari to the Supreme Court of Florida, Hallman v. Florida, No. 74-6168 (filed March 11, 1975)(attached as App. B, infra).

The potential for freakish and arbitrary imposition of the death penalty under Florida's post-Furman capital punishment statute is highlighted in this case where the jury returned a first degree murder verdict[11] despite the total absence of proof

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11/ The Florida Supreme Court's recent decision in Gilford v. State, Fla. Sup. Ct. No. 44,535 (April 9, 1975), slip opinion attached as Appendix C, infra, does not alter the long-standing Florida rule that in a first degree murder case, a defendant has an absolute right to have his jury instructed on second degree murder, third degree murder, and manslaughter, regardless of the evidence. Gilford, a larceny case, further explicated the rules set forth in Brown v. State, 206 So.2d 377 (Fla. 1968) pertaining to the "category 3" and "category 4" kinds of lesser-included-offenses in the Brown typology (respectively, "Offenses necessarily included in the offense charged", and "Offenses which may or may not be included in the offense charged, depending on the accusatory pleading and the evidence." Brown v. State, supra, 206 So.2d at 381 (emphasis in original)). Homicide offenses exemplify what Brown termed a "category 1" kind of offense, "Crimes divisible into degrees." Brown v. State, supra, 206 So.2d at 381. Of such offenses, the Brown opinion declared:

> "Section 919.14 [now Fla. R. Crim. P. 3.490(1974-1975 supp.); at the time of Brown, as now, this provision stated that '[i]f the indictment or information charges an offense which is divided into degrees . . . [t]he court shall in all such cases charge the jury as to the degrees of the offense.'] applies only to those crimes which are divided into degrees, e.g., unlawful homicide . . . . If an accused is charged with the highest degree of such a crime, the court should charge the jury

of anything which could rationally[12] be called "premeditation" or "deliberation". On the basis of the evidence presented at the sentencing hearing, the jury recommended a sentence of life imprisonment.

The capriciousness of Florida's capital procedure was again exemplified, however, when the trial court rejected the jury's recommendation of mercy (a recommendation presumably -- although not ascertainably -- based on a recognition of petitioner's heavy drinking)[13] and imposed a death sentence on the basis of undisclosed information in the pre-sentencing investigation report.

11/ cont'd.

> on all lesser degrees. In this category it is immaterial whether the indictment specifically charges the lesser degrees or whether there is any evidence of a crime of such degree. Killen v. State, 92 So.2d 825 (Fla. 1957); Brown v. State, 124 So.2d 481 (Fla. 1960). The court must instruct on the lesser degrees simply because §919.14 clearly requires it, and not because such degrees are necessarily included lesser offenses . . . . If the evidence is sufficient to support a verdict of guilty of the offense charged, the jury has the power, under §919.14 to find the accused guilty of a lesser degree of the offense regardless of the lack of evidence as to such degree."

Brown v. State, supra, 206 So.2d at 381. In the 1960 Brown v. State case cited in the 1968 Brown decision, the Court held that manslaughter was, with second and third degree murder, a "lesser degree" of a first degree murder charge. 124 So.2d 481, 493 (1960).

12/ Petitioner's statement that he "was going back and beat hell out of his wife," T. 187, made to "Buckeye" at approximately 11:00-11:30 p.m., June 29, 1973, T. 186, is the only bit of circumstantial evidence from which premeditation and deliberation might be inferred.

13/ Two psychiatrists conducted pre-trial psychiatric examinations of petitioner. Dr. George W. Barnard concluded that "[in] my medical opinion the prisoner is an alcoholic, R. 10; "[i]t is also my medical opinion had he not been under the influence of alcohol at the time of the alleged crime, he would have been competent, knowing right from wrong and being capable of adhering to the right," ibid. Dr. Frank Carrera III stated similar conclusions, R. 14-15, adding that "[b]ecause of his history of alcoholism I would recommend that he be provided with treatment for his alcoholism." R. 15.

II. THE COURT SHOULD GRANT CERTIORARI TO CONSIDER WHETHER NONDISCLOSURE OF A "CONFIDENTIAL" PORTION OF A PRE-SENTENCE INVESTIGATION REPORT TO A DEFENDANT CONVICTED OF A CAPITAL CRIME CONSTITUTES A DENIAL OF THE EFFECTIVE ASSISTANCE OF COUNSEL GUARANTEED BY THE SIXTH AND FOURTEENTH AMENDMENTS TO THE CONSTITUTION OF THE UNITED STATES, AND OF THE RIGHT TO A FAIR HEARING AS GUARANTEED BY THE DUE PROCESS CLAUSE OF THE FOURTEENTH AMENDMENT, IN A CASE WHERE THE TRIAL JUDGE DECLINES TO ACCEPT A JURY RECOMMENDATION OF A LIFE SENTENCE AND INSTEAD IMPOSES THE DEATH SENTENCE PARTIALLY ON THE BASIS OF THE PRE-SENTENCE REPORT.

On the day petitioner's sentencing jury returned an advisory sentence of life imprisonment, the trial court ordered a Pre-Sentence Investigation Report prepared by the Florida Parole and Probation Commission. T. 357. Twenty days later, on January 30, 1974, after receiving the PSI Report, the trial court overruled the jury's recommendation and sentenced petitioner to death. R. 49-51. The "Findings of Fact" entered by the trial court 14/ recited that this sentence was being imposed "after . . . the receipt of a pre-sentence investigative report on said defendant . . . and receipt by the State and defendant's attorney of a copy of that portion thereof to which they are entitled"

14/ These "Findings of Fact" were apparently announced in open court, although the transcript of this proceeding is not included in the record of this case. The "Judgment and Sentence", R. 51, recites that after the "Findings of Fact" were filed, "the defendant . . . [was] asked by the court whether he had anything to say why sentence of the law should not now be pronounced upon him, and . . . [said] nothing to preclude such sentence." Sentence and judgment were "DONE AND ORDERED in open court . . . this 30th day of January, 1974."

and "after . . . reviewing the factual information contained in said pre-sentence investigation." R. 49 (emphasis added). 15/ The trial court apparently did not make full disclosure to petitioner of the contents of the PSI Report. 16/ Dissenting in the court

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15/ The three pages of the PSI Report which were furnished to petitioner were added to the record below in a Supplement to Transcript of Record, filed in the Florida Supreme Court on May 8, 1974; this Supplement is unpaginated.

16/ Florida Rules of Criminal Procedure 3.710 (1974-1975 supp.) authorize the trial court to request a presentence report from the Probation and Parole Commission "[i]n all cases in which the court has discretion as to what sentence may be imposed." Rule 3.713(a) (1974-1975 supp.) states that "[t]he trial judge may disclose any of the contents of the presentence investigation to the parties prior to sentencing." (Emphasis added.) Rule 3.713(b)(1974-1975 supp.) provides:

> "[t]he trial judge shall disclose all factual material, including but not limited to the defendant's education, prior occupation, prior arrests, prior convictions, military service and the like, to the defendant and the State a reasonable time prior to sentencing. If any physical or mental evaluations of the defendant have been made and are to be considered for the purposes of sentencing or release, such reports shall be disclosed to counsel for both parties."

(Emphasis added). The 1972 legislative committee annotation to Rule 3.713 stated:

> "This rule represents a compromise between the philosophy that presentence investigations should be fully disclosed to a defendant and the objection that such disclosure would dry up sources of confidential information and render such report virtually useless. (a) gives the trial judge discretion to disclose any or all of the report to the parties. (b) makes mandatory the disclosure of factual and physical and mental evaluation material only. In this way, it is left to the discretion of the trial judge to disclose to a defendant or his counsel any other evaluative material. The Judicial discretion should amply protect

below, Mr. Justice Ervin declared:

> "it appears from the record that there was a 'confidential' portion of the PSI report made available to the trial judge which was not provided to either Appellant [petitioner] or Appellee. In fact, it is unclear from the record whether this Court has been provided the 'confidential' portion thereof for our review, a critical final step between conviction and imposition of the death penalty -- one of the safeguards outlined in Dixon [State v. Dixon, 283 So.2d 1 (Fla. 1973)]. What evidence or opinion was contained in the 'confidential' portion of the report is purely conjectural and absolutely unknown to and therefore unrebuttable by Appellant. We have no means of determining on review what role such 'confidential' information played in the trial judge's sentence, and thus I would overturn Appellant's death sentence on the basis of this fundamental error alone."

Gardner v. State, Fla. Sup. Ct. No. 45,106 (Feb. 26, 1975), slip op. at 6-7 (emphasis in original); App. A, infra, at 6a-7a.

The Court should grant certiorari to consider whether such nondisclosure violates a capital defendant's right to due process of law. It is established that sentencing procedure is not "immune from scrutiny under the due-process clause," Williams v. New York, 337 U.S. 241, 252 n.18 (1949). Accord: Townsend v. Burke, 334 U.S. 736 (1948). In Specht v. Patterson, 386 U.S. 605 (1967), this Court ruled that where "the commission of a specified crime" is not alone the basis for sentencing and where instead "a new finding of fact . . . that was not an

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16/ cont'd.

> the confidentiality of those sources who do not wish to be disclosed, while the availability of all factual material to the defendant will permit him to discover and make known to the sentencing court any errors which may appear in the report."

Note, Fla. R. Crim. P. 3.713 (1974-1975 supp.).

ingredient of the offense charged," 386 U.S. at 608, is the predicate for a special sentence, ordinary due process safeguards must be extended to a convicted defendant in the proceeding to determine the special sentence. See also Humphrey v. Cady, 405 U.S. 504 (1972). The Florida capital sentencing procedure is precisely analogous to the Colorado Sex Offenders Act procedures challenged in Specht. In order to convict for first degree murder, the State must prove beyond a reasonable doubt "[t]he unlawful killing of a human being, . . . perpetrated from a premeditated design to effect the death of the person killed . . . or . . . committed by a person engaged in the perpetration [of specified felonies] . . . or . . . result[ing] from the unlawful distribution of heroin [under certain circumstances]." Fla. Stat. Ann. §782.04(1)(a)(1974-1975 supp.). In order to impose a death sentence, however, "[s]eparate proceedings," Fla. Stat. Ann. §921.141(1)(1974-1975 supp.) must be convened, and further special findings must be made. The trial court must enter "[f]indings in support of sentence of death," §921.141(3):

> "if the court imposes a sentence of death, it shall set forth in writing its findings upon which the sentence of death is based as to the facts:
>
> (a) That sufficient aggravating circumstances exist as enumerated in subsection (6), and
>
> (b) That there are insufficient mitigating circumstances, as enumerated in subsection (7), to outweigh the aggravating circumstances. In each case in which the court imposes the death sentence, the determination of the court shall be supported by specific written findings of fact based upon the circumstances in subsection (6) and (7) and upon the records of the trial and the sentencing proceedings."

§921.141(3).[17/] Proof of the statutory "aggravating circumstances"

17/ This section further provides that if the formal written

is not a necessary part of the elements the State must establish to secure a guilty verdict at the first stage of Florida's bifurcated capital procedure.

It is not clear that the full panoply of due process protection available at a criminal trial should be applicable at the second stage of a bifurcated capital trial, cf. Specht v. Patterson, 386 U.S. 605, 606 (1967); Witherspoon v. Illinois, 391 U.S. 510, 522 n.20 (1968). In order to base sentences on "the best available information rather than on guesswork and inadequate information," it may be that such information should not be restricted "to that given in open court by witnesses subject to cross-examination." Williams v. New York, 337 U.S. 241, 249-250 (1949)(footnote omitted). Given the traditional flexibility of due process protections, see, e.g., Boddie v. Connecticut, 401 U.S. 371, 378 (1971), the Court should consider how the

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17/ cont'd.

findings concerning statutory aggravating and mitigating circumstances are not made, the trial court "shall impose sentence of life imprisonment." At the second stage of a capital trial, Florida trial judges do not have a broadly calibrated range of sentences to impose, since they may only sentence a convicted defendant to death or life imprisonment. Fla. Stat. Ann. §755.082(1)(1974-1975 supp.). The sentencing discretion of the trial judges is ostensibly "controlled and channelled [by the procedures required by §921.141] until the sentencing process becomes a matter of reasoned judgment rather than an exercise in discretion at all." State v. Dixon, 283 So.2d 1, 10 (Fla. 1973). (But see App.B, infra at). In Williams v. New York, 337 U.S. 241 (1949), this Court noted that New York trial judges possessed "a broad discretion to decide the type and extent of punishment for convicted defendants," 337 U.S. at 245, and that New York criminal statutes typically set "wide limits for maximum and minimum sentences", 337 U.S. at 251.

need for comprehensive information on which to base sentences should be balanced against the right of a convicted defendant to basic procedural fairness. In the present case, the non-disclosure to petitioner of the confidential information in the PSI Report appears fundamentally unfair. The sentencing jury, which had not seen the Report, recommended a sentence of life imprisonment. But, after reviewing this Report, the trial court imposed a sentence of death. The portion of the Report which was made available to petitioner contained vague and pejorative statements such as "Law enforcement authorities are quite strong in their opinion of the subject, they consider the subject a menace to society. They feel he should not be let to roam the streets . . . ."[18/] It is impossible to speculate where a report of this sort may have wandered, whether or how it might have supported the amorphous and damaging "opinion" of unnamed police officers regarding petitioner, and what additional pejorative information it may have contained. But surely the petitioner, with his life at stake, was entitled to sufficient information so that his attorney could advisedly decide whether any or all portions of the Report -- presently disclosed or undisclosed -- were subject to refutation or explanation. It is established that counsel "is required at every stage of a criminal proceeding where substantial rights of a criminal accused may be affected." Mempa v. Rhay, 389 U.S. 128, 135 (1967).

18/ Supplement to Transcript of Record (filed in Florida Supreme Court on May 8, 1974)(unpaginated).

By not making this portion of the Report available to petitioner and his counsel, the trial court denied petitioner's right to counsel just as effectively as if it had refused to allow petitioner to have counsel present with him when sentence was imposed. See Townsend v. Burke, supra, 334 U.S. at 738-741.

It is, of course, unclear from this record what confidential information the trial court based its death sentence upon. Petitioner should surely not be penalized because he cannot recite with particularity the information which was not disclosed to him. "The magnitude of a decision to take a human life is probably unparalleled in the human experience of a member of a civilized society." Marion v. Beto, 434 F.2d 29, 32 (CA5 1970). To ward against unconstitutional jury selection practices at capital trials, this Court has required a record to be kept of the exclusion for cause of veniremen with conscientious scruples against the death penalty, see Witherspoon v. Illinois, 391 U.S. 510, 522 n.21 (1968), and it has reversed death sentences where the record was silent as to the specifics of such exclusions, Mathis v. Alabama, 403 U.S. 946 (1971), rev'g 283 Ala. 308, 216 So.2d 286 (1968); Funicello v. New Jersey, 403 U.S. 948 (1971), rev'g State v. Forcella, 52 N.J. 263, 245 A.2d 181 (1968). Similarly, in cases where a sentence of death at a bifurcated trial is predicated upon particular findings by a sentencing judge or jury, the Court should require that the record affirmatively indicate the factual basis upon which the findings are made in order to prevent such a sentence from being imposed "on the basis of assumptions . . . which [are] . . . materially untrue." Townsend v. Burke, supra,

334 U.S. at 741. This entails, at the very least, providing counsel for a capital defendant with all investigative reports prepared to assist the trial judge in imposing sentence. While counsel might not have changed the sentence" had petitioner been apprised of the entire contents of the PSI report, "he could have taken steps to see that the conviction and sentence were not predicated on misinformation," Townsend v. Burke, supra, 334 U.S. at 741.

CONCLUSION

Petitioner prays that the petition for a writ of certiorari be granted.

RESPECTFULLY SUBMITTED,

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ATTORNEYS FOR PETITIONER

APPENDIX

In the Supreme Court of the United States

OCTOBER TERM, 1976

No. 74-6593

DANIEL WILBUR GARDNER, *Petitioner*

v.

STATE OF FLORIDA, *Respondent*

ON WRIT OF CERTIORARI
TO THE SUPREME COURT OF FLORIDA

**PETITION FOR CERTIORARI FILED,
MAY 24, 1975**

CERTIORARI GRANTED, JULY 6, 1976

APPENDIX

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TO THE SUPREME COURT OF FLORIDA

**PETITION FOR CERTIORARI FILED,
MAY 24, 1975**

CERTIORARI GRANTED, JULY 6, 1976

INDEX

CHRONOLOGY

August 22, 1973: Indictment returned by Citrus County, Florida, grand jury charging that petitioner "did unlawfully and from a premeditated design kill Bertha Mae Gardner . . . by striking her with a blunt instrument . . . in violation of Florida Statute 782.04(1) [which defines first degree murder]".

August 29, 1973: Petitioner moved for a psychiatric examination.

September 5, 1973: Petitioner determined to be indigent and counsel appointed to represent him.

October 17, 1973: Psychiatric examination ordered.

January 7, 1974: Selection of Petitioner's trial jury began.

January 8, 1974: Presentation of State's evidence began.

January 9, 1974: Petitioner filed form waiving right to testify.

January 9, 1974: Psychiatric Evaluation Report of Dr. George W. Bernard filed.

January 10, 1974: Jury returned verdict finding petitioner guilty of first degree murder.

January 10, 1974: Trial court ordered pre-sentence investigation report.

January 10, 1974: Jury returned advisory sentencing verdict recommending petitioner be sentenced to life imprisonment.

January 11, 1974: Psychiatric Evaluation Report of Dr. Frank Carrera, III, filed.

January 22, 1974: Petitioner filed motion for new trial.

January 28, 1974: Pre-sentencing investigation report submitted to trial court.

January 30, 1974: Trial court filed findings of fact and sentenced petitioner to death.

February 5, 1974: Petitioner filed second motion for a new trial.

March 21, 1974: Trial court denied motions for a new trial.

April 5, 1974: Petitioner filed assignments of error.

February 26, 1975: Supreme Court of Florida affirmed petitioner's conviction and sentence, with two Justices dissenting.

April 7, 1975: Mr. Justice Powell entered an order staying execution of petitioner's death sentence "pending the timely filing and disposition by this Court of a petition for a writ of certiorari . . . . In the event the petition for a writ of certiorari is granted, this stay is to continue pending the issuance of the mandate of this Court."

May 24, 1975: Petition for certiorari and motion to proceed *in forma pauperis* filed in Supreme Court of the United States.

July 6, 1976: Petition for certiorari and motion to proceed *in forma pauperis* granted, limited to Question Two.

[Indictment]

In the Circuit Court of the Fifth Judicial Circuit of the State of Florida, for *Citrus* County
At the *Fall* Term Thereof, in the Year of Our Lord One Thousand
Nine Hundred and *Seventy Three* County, to-wit: *Citrus*

In the Name and by Authority of the State of Florida:

The Grand Jurors of the State of Florida, enquiring in and for the body of the County of *Citrus* upon their oaths do present that *Daniel Wilber Gardner*

late of the County of *Citrus* aforesaid, in the Circuit and State aforesaid, laborer, on the *30th* day of *June* in the Year of Our Lord, One Thousand Nine Hundred and *Seventy Three* with force and arms at and in the County of *Citrus* aforesaid,

did unlawfully and from a premeditated design kill Bertha Mae Gardner, a human being, by striking her with a blunt instrument, a more particular description to this Grand Jury unknown, did inflict in and upon the body of the said Bertha Mae Gardner, a mortal wound and of which mortal wound the said Bertha Mae Gardner did die, in violation of Florida Statute 782.04(1).

FILED & RECORDED
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CITRUS FLORIDA
WALT COBB, CLERK

Contrary to the Form of the Statute, in such cases made and provided, and against the peace and dignity of the State of Florida.

Assistant State Attorney, Fifth Judicial Circuit of Florida

* The record in the Florida Supreme Court consists of a three volume Transcript of Record (Volume I is paginated 1-73, Volume II is paginated 1-200, and Volume III is paginated 201-360), and a Supplement to Transcript of Record. References to the Transcript of Record will hereinafter appear in brackets and will include both a volume and a page number.

[Motion for Psychiatric Examination]

IN THE CIRCUIT COURT OF THE FIFTH JUDICIAL CIRCUIT OF FLORIDA
IN AND FOR Citrus County. Criminal Case No. 73-1325-FM-A-01.

STATE OF FLORIDA)
-vs-)
DANIEL WILSUR GARDNER,)
Defendant)

MOTION FOR PSYCHIATRIC EXAMINATION

Comes now the above styled defendant, by and through his undersigned attorney, and respectfully moves the Court to order a psychiatric and psychological examination of said defendant under the provisions of Chapter _____, Florida Statutes Annotated and CrPR 1.210.

I DO CERTIFY that copy hereof has been furnished to W. T. Green Assistant State Attorney, Citrus County, 508 N.E. Citrus Ave., Crystal River, Florida 32629 by mail (hand) this 29th day of August, 19 73

Michael T. Kovach
Assistant Public Defender
Attorney for Defendant
213 N. Apopka Ave.
Inverness, Florida 32650

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CITRUS
WALT COBB, CLERK, FLORIDA

[Appointment of Counsel]

IN THE CIRCUIT COURT OF CITRUS COUNTY, FLORIDA

CRIMINAL CASE NO. 73-132

FILED & RECORDED
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CITRUS
WALT COBB, CLERK, FLORIDA

STATE OF FLORIDA)
vs.)
Daniel Wilsur Gardner)
Defendant)

ORDER OF REAPPOINTMENT

THIS CAUSE coming on this day to be heard upon Defendant's request that this Court reappoint the Public Defender's office to represent him and this Court further finding that said defendant is indigent within the meaning of Rule 3.111(b)(4) of the Florida Rules of Criminal Procedure, and the Court being otherwise fully advised in the premises, it is thereupon

ORDERED AND ADJUDGED as follows:

(1) That the defendant be, and he is hereby declared to be indigent within the meaning of Rule 3.111(b)(4) of the Florida Rules of Criminal Procedure; and

(2) That the office of the Public Defender for the Fifth Judicial Circuit in and for Citrus County, Florida, is hereby reappointed to represent said defendant in the above-styled cause and in any other controversy pending between the State of Florida and the said defendant.

DONE AND ORDERED this 5th day of September, 19 73 at Inverness, Citrus County, Florida.

J. W. Boott
Circuit Judge

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[Order for Mental Examination]

IN THE CIRCUIT COURT OF THE FIFTH JUDICIAL CIRCUIT OF FLORIDA
IN AND FOR Citrus County. Criminal Case No. 73/1325/CF-A-01
73/132a/CF-A-01

STATE OF FLORIDA)

-vs-)

Daniel Wilbur Gardner,)

Defendant)

ORDER FOR MENTAL EXAMINATION
(See applicable provisions of Chapter 917 FSA and CrPR 3.210)

Subject case being before the Court and it having been brought to the attention of the Court that there is reasonable cause to believe that the defendant is insane and the Court being under a duty to determine the defendant's mental condition, it is, upon consideration

ORDERED that the following two disinterested qualified experts be and they hereby are appointed to examine the defendant and to make written reports to this Court as to the mental condition of the defendant at the time of the alleged crime and at the time of their examination. The said written reports shall be mailed and delivered directly to the undersigned Circuit Judge, together with the statement of fees for said examination:

Dr. George W. Bernard
University of Florida
Medical Center
Gainesville, Florida

Dr. George P. Barringer
University of Florida
Medical Center
Gainesville, Florida

That the Sheriff of Citrus County, Florida, be and he is hereby authorized and directed to make all necessary arrangements, including safe and secure transportation, for said defendant to be examined by the aforesaid experts at the earliest convenient time and place consistent with the security of the prisoner.

That the Clerk of this Court be and he is hereby authorized and directed to furnish conformed copies of this Order to the Doctors, the Attorneys, the Sheriff and the defendant; the undersigned Circuit Judge shall cause distribution of the Doctor's report to be made to the State Attorney and attorney for defendant and shall file the original of said Doctor's report with the Clerk of the Circuit Court who shall forthwith seal said Doctors' report and maintain the same as a confidential and privileged matter of the record herein, unless and until otherwise ordered by this Court; all at the expense of Citrus County, in accordance with the laws made and provided for such cases.

That the attorneys of record in this case are hereby authorized to communicate with the appointed Doctors on a confidential basis and furnish them such relevant information concerning the defendant and circumstances attending this case as they may deem helpful and proper in the premises.

DONE AND ORDERED in Chambers, at the Citrus County Courthouse, Inverness, Florida, this 12th day of October, 1973.

FILED AND RECORDED
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CITRUS COUNTY, FLORIDA
WALT CRITCHLOW, CLERK

Circuit Judge

7

[Waiver of Right to Testify]

WAIVER OR ELECTION TO TESTIFY

I, the Defendant herein, having been fully advised to my right to take the stand and testify in my own behalf and the possible consequences thereof, do hereby freely and voluntarily elect (not to) (~~to~~) take the witness stand and testify in my own behalf.

Defendant

Dated: Nov. 9, 1973

[PSYCHIATRIST'S REPORT:
DR. GEORGE W. BERNARD]

Daniel Wilbur Gardner
Citrus County

This 39 year old white widowed male prisoner was seen in psychiatric evaluation at the Citrus County Jail by Drs. Barnard and Carrera on 6 November 1973. Psychiatric evaluation had been requested by the Honorable John Booth, Judge of the 5th Judicial Circuit in and for Citrus County. This is Case 73-1325-FM-A-01. Mr. Gardner said he was arrested June 30, 1973 and charged with first degree murder of his wife, Bertha. The alleged crime is said to have taken place about midnight Friday, 29 June, 1973. He related the following story.

On the day of the alleged crime, he woke up at his home with his wife and four children. He had breakfast. Later that morning he went with a friend, Wayne Ritchie. He had several beers, and about 11:30 he had two half cups of vodka and orange juice with Ritchie and a friend, Jerry. They went to a beer tavern called My Brother's Place, and he had some more beers but could not estimate how many. Later he went to the Sugar Mill Tavern and drank whiskey and coke. About 11:00 P.M. his wife came in. They drank together for about 30 minutes and then left.

He said past this point he has difficulty with his memory and with the time sequence. At his house he asked where the children were, and she did not tell him. He said she acted as though the drinks were getting to her. He went next door to his mother-in-law's trailer, but the children were not there. While there, his wife walked up in the nude. His wife fell several times. He and another man, Buckshot, carried his wife to the house but Buckshot fell and Gardner's wife hit her eye on the door. Later, in the house, he tried to bathe her but she fell in the tub several times. He lay on the bed with her, backslapping something in her crotch between the legs. He said it seemed to be about a foot in diameter and had reddish tint about the same color as his wife's hair, but he did not think it was part of her. Later they lay on the bed together. He was exhausted. The next morning he woke up, called her name

a few times and noticed she was not breathing. He gave her mouth-to-mouth resuscitation. He then ran next door and asked for them to call an ambulance. He returned and gave her mouth-to-mouth resuscitation. When the ambulance driver came, he said it was no longer any use. The police came, stayed a short time and then arrested him. He has been in jail since that time.

Previous Criminal Record: In the early 50's, he was charged DWI and reckless driving. He had a suspended license and was in jail 20 days. In 1953, he was investigated with a girl who was connected with drugs and released after one day. In 1960 he was charged with assault on his first wife, and the case was dismissed. In 1968, he was charged with attempted murder, but it was a mistake. He was not placed in jail and the charges were dismissed. In 1969, he was charged with assault. His wife brought the charges after an argument, and she was afraid of him. The charges were dropped. In 1971, while he was drunk, his wife brought charges of assault. He said he popped her on the backside and left a bruise. The charges were dropped.

Past History: He was born in Homosassa February 9, 1934. His mother is about 60. His father died three months before Mr. Gardner was born. His mother remarried about 6 months later and lived with his step-father until he was 12. They were separated for about a year and then went back together. Mr. Gardner is third in a sibling group of three. He finished the 7th grade and quit school at age 15. He had failed the 7th grade two times because he lacked interest in school. He was never suspended or expelled. After his mother and stepfather separated at age 12, there was no one to care for him and he was sent to a boys' home in Jacksonville where he remained until age 15. At age 15 he was discharged to his mother and step-father and he went to work. He entered the Air Force in 1952 and was discharged with an honorable discharge in 1956 at age 22. After his discharge from the service, he has worked on a commercial fishing boat and as a carpenter.

He married for the first time in 1958 when he was 24 and his wife was 21. They were married seven years and had no children. He left her. He was married for the second time in

1956 when he was 33 and his wife was 21. They had four children by this marriage. He felt the marriage went well for most of the time but for several months prior to the time of the alleged crime, he and his wife had more trouble after his mother-in-law moved in next door. He thought his mother-in-law was an alcoholic and several times when she has babysat for them, she has passed out. About three weeks prior to the time of the alleged crime, his wife was out with his step-brother, Johnny, and he felt they had had sex. He left for a brief time and then talked it over, and they decided to stay together.

Medical History: He has had no operations and no serious illnesses. He had a broken collar bone while he was in the service. In 1953 he had an automobile accident and was unconscious for a few minutes. He has had no V.D., no fits convulsions, seizures and no suicidal attempts. He has had visual hallucinations one night after drinking heavily and he thought he saw a snake in moss. He has had no psychiatric treatment and has never been a patient in a mental hospital.

He has used marijuana several times, but no other illegal drugs. He began the use of alcohol at age 16 and drank heavily every weekend since 1956. He has had the shakes quite a bit but no DT's other than the visual hallucination mentioned above. During the past year, at times he will go 2-3 days drunk. He has had no treatment for his alcohol excess. His sister died of alcoholic cirrhosis of the liver. His father was a heavy drinker, and his half-brother a heavy drinker.

Mental Status: The prisoner is a man who appears his stated age. He is oriented for person, place, situation and partially oriented for time in that he knows the correct year, day of the month, and day of the week, but thinks it is October instead of November. He has a mild recent memory deficit, but his remote memory other than the time surrounding the time of the alleged crime appears intact. He can abstract proverbs without difficulty and solve practical problems which are given him. There is no indication of a thought disorder, specifically no looseness of associations or delusions. His affect is said to be appropriate. He is depressed and has a sad facial expression, but says he is unable to show feelings and specifically he cannot cry over the loss of his wife. He does not think he killed her, but thinks she fell and injured her internal organs and bled to death.

Summary and Conclusions: This is a 39 year old white widowed male prisoner charged with first degree murder. On psychiatric examination at this time, there is no indication of psychosis. It is my medical opinion the prisoner is competent and able to assist counsel in the preparation of his defense. It is also my medical opinion had he not been under the influence of alcohol at the time of the alleged crime, he would have been competent, knowing right from wrong and being capable of adhering to the right. It is my medical opinion the prisoner is an alcoholic, and at some point the courts may wish to have him placed on an Antabuse program wherein he receives Antabuse daily from a druggist. It is also my medical opinion he is depressed over the death of his wife and could benefit from an antidepressant such as Elavil, 50 milligrams three times a day.

George W. Barnard, M.D.

[PSYCHIATRIST'S REPORT: DR. FRANK CARRERA]

Daniel Wilbur Gardner
Citrus County
Case #73-1325-FM-A01

This 39 year old, white, widowed man from Homossassa, Florida was seen for psychiatric evaluation by Drs. Carrera and Bernard on Tuesday, November 6, 1973 in the Citrus County Jail, Inverness, Florida. Psychiatric examination was ordered by the Honorable John Booth, Judge of the 5th Judicial Circuit, in and for Citrus County, Florida.

PRESENT ARREST AND CHARGES: Mr. Gardner said that he was arrested on June 30, 1973, a Saturday morning, in Homossassa, Florida. He reported that he was charged with the 1st degree murder of his 27 year old wife, Bertha. He said that the alleged murder had occurred at around midnight on June 29, 1973 in the Gardner home. Mr. Gardner said that the papers had reported that his wife had died from a "a beating".

HISTORY SURROUNDING THE PRESENT ARREST: On the day of the alleged crime Mr. Gardner said that he woke up at his home at 7:00 a.m. and that his wife and four children were there. They breakfasted together and then Gardner stayed home and watched television because he had been out of work for approximately 1 month. At 10:00 a.m. a friend, Wayne Ritchie, came to the house accompanied by a 14 year old boy, Calvin. Ritchie invited Gardner to go have a beer and at around 10:00 a.m. Gardner and Calvin left in Ritchie's car. They drove to a convenience store where he bought one six pack of beer and then drove to a cousin's house, Denny Oliver, where he drank two beers. While there, a Jerry Oliver came to the house and invited Gardner and Ritchie to go have a drink. These 3 then went in Ritchie's car, bought orange juice at another convenience store and then parked at the end of a road where the three of them drank vodka and orange juice beginning at about 11:30 a.m. Mr. Gardner reported that he drank two half-cups of vodka with orange juice there. They

then went looking for more drinks and rode around partying and ended up at a beer tavern called "My Brother's Place" on Highway 19. Mr. Gardner said that he remembered being there drinking beer but he could not recall how many he had drunk. He said that he did not have lunch that day and he did not remember all that happened at the tavern but did remember talking to the proprietor probably until 2:00 or 3:00 p.m. about whether Mr. Gardner wanted to lease the tavern from the owner. Mr. Gardner said that he recalled Ritchie and Jerry Oliver there at the tavern bar while he sat at a table.

Mr. Gardner said that the next thing he remembered he was sitting at the Sugar Mill Tavern in Homossassa with two women at about 10:30 p.m. He then reported that his wife came in to the tavern at approximately 11:00 p.m. and met him as he was walking back to the table with the two women. His wife asked him to get her a drink which he did and then he suggested to his wife that they join the two women and they did. According to Mr. Gardner, his wife did not seem to be upset about anything and after about 20 minutes the two other women got up and left without any arguments or fussing. At the Sugar Mill Tavern Mr. Gardner said that he was drinking whiskey and coke. He remembered asking his wife how she had gotten to the tavern and where the children were but he did not remember what her answer was. His wife and he finished their drink and then got up and started toward the door. Mr. Gardner then saw a friend, Oscar Lyle, to whom he waved and told him he would see him later although he was not planning to come back to the tavern. He said that he had his arm around his wife when he got to the door and asked Ritchie if he was ready to take them home. Ritchie walked out toward the car and the couple followed. He remembered having his arm around his wife and opening the door of the car for her but then said he has no memory for what occurred until after they had arrived home. The next thing he remembered was that his wife and he were out of the car at the house and the car was backing out. Mr. Gardner then recited several events which occurred from that point on but said, "I can't put time or order to the next memories".

Inside the house he asked his wife where the children were and he reported that his wife had a smirk on her face and said, "wouldn't you like to know?" and dared him to find out. When Gardner asked her if the children were with her mother his wife said, "go find out". Mr. Gardner then went to his wife's mother's trailer which was nearby and knocked on the door. He said that his mother-in-law answered the door but that she was so drunk that she could not stand up. When he asked her where his children were she reportedly said, "if you weren't such a sorry s.o.b. you'd know where your kids are". She then slammed the door in Gardner's face. Mr. Gardner said that at that moment he felt a loud, piercing scream in his head like "something went over me . . . I felt light . . . a floating sensation . . . a hate feeling". He then kicked in the door to the trailer and hit his mother-in-law in the mouth with the door. He then said he saw his wife walking up to the trailer and that she was nude. The next thing he remembered is his wife being in the middle of the road while he had her by the arms trying to get her into the house. He remembered she fell back on the road and "I could feel she was hurt . . . at this point I wasn't mad at anybody . . . I was just floating and things were happening without my control . . . I tried to pick her up . . . she fell again . . . walking back to the house she fell on the dirt again". Mr. Gardner said that he then went to his mother-in-law's trailer to ask the man who was in there to help him get his wife into the house and they both carried her to the house while she fought them. At the doorstep Mr. Gardner said that the man who was helping him tripped and that his wife fell on her left side and hurt her right face. He remembered seeing the cut on her right eye after she had hit the door frame. He next remembers being with his wife in the living room and hearing "crazy noises . . . echos . . . kids crying . . . a sensation of somebody or something in the room . . . a frightened feeling". He then remembers helping his wife get into the tub to wash the sand off of her and his trying to help her stand up. He remembered reaching down to turn the water off and his wife slipping and falling into the tub. He thinks that he remembered that she was laughing at this time. He tried to

help his wife up, turned the shower on and she fell again. He then helped her out of the tub. The next memory he has is being in the bed with his w fe. He remembered slapping here with the back of his hand on her crotch because it seemed like "something was there . . . looked like something with a lot of hair . . . one foot in diameter . . . reddish tint to it . . . same color as my wife's hair . . . I didn't think it was part of her". He next remembers going to sleep and being exhausted and remembered his wife arguing with him and saying that he would "pay for it". He remembered putting his arm across her shoulder and then fell asleep.

The next morning Mr. Gardner said that he woke up suddenly, called his wife's name, shook her by the shoulder several times but got no answer from her and he noticed that she was not breathing. He rolled his wife on the bed and shook her face and he thought that she took two light breaths and then stopped. Mr. Gardner tried mouth to mouth resusitation for two minutes and then went to his mother-in-law's trailer to have them call an ambulance. He rushed back into the house then and administered more mouth to mouth resusitation and continued doing that until the ambulance arrived. The ambulance driver then told Mr. Gardner that there was no more use to his trying to resusitate his wife. Mr. Gardner said that he then "went to pieces" and was crying when he was arrested. He has been in jail since the day of his arrest.

Mr. Gardner said that he pleaded not guilty on September 5, 1973 and that it was his attorney's idea that he undergo this psychiatric examination.

PREVIOUS ARRESTS: In the early 1950's he was arrested for driving while intoxicated and reckless driving in St. Augustine. He spent 23 days in jail and had his driver's license suspended for 1 year. In 1953 in Memphis, Tennessee he was picked up as part of an investigation but was released. In 1960 or 61 he was arrested for aggravated assault in Bowkey, Florida. His first wife brought the charges but then the charges were dismissed. In 1968 he was arrested on an attempted murder charge in Citrus County but these charges were also dismissed. In 1969 or 70 he was arrested on an assault charge filed by his wife but she

dropped the charges after he had spent two hours in jail. In 1971 his wife again had him arrested on an assault charge but these charges were also dropped.

PERSONAL HISTORY: Mr. Gardner said that he was born in Homossassa on February 9, 1934. His mother is 60 years old and his father died at age 36 in 1934 before Mr. Gardner was born. His father died with pneumonia. He is the third of 3 children born to that couple. His sister died in 1958 at the age of 26 years of cirrhosis of the liver secondary to alcoholism. He has one brother age 44 years old. Mr. Gardner said that his mother remarried when he was 6 months old and that his stepfather and mother separated in 1946 when he was 12 years old for 1 year. They then got back together again and are still married. His stepfather is 61 years old and in fair health. He has two half-brothers.

He said that he never felt close to his family and thinks that this was due to the presence of a stepfather whom he and his brother could not stand. He described his stepfather as a sadist when they were little and said that he was very strict with the boys and would beat them severely. He said that he had always been able to get along well with his mother.

He quit 7th grade in school at the age of 15 years. He said he had failed 7th grade twice when he lost interest in school and was feeling ready to go on his own. He denied ever being suspended or expelled from school and says that he got along well with the teachers and the other students.

Between the ages of 12 and 15 years he lived in the Boy's Home in Jacksonville. He said his parents put him there because they could not afford to keep him after the parents separated. He does not recall this as a particularly bad time and thinks it may have been the only good part of his life. He was discharged from the Boy's Home to his mother and stepfather at the age of 15.

He then went to work for a newspaper in Jacksonville and then as a commercial fisherman in Clearwater until the age of 17 years. He then joined the National Guard and then joined the Air Force in 1952 at the age of 18 years. He was discharged at the age of 22 years in September, 1956. He said that he attained the rank of Buck Sergeant but lost

a stripe overseas and another stripe in Orlando for unrelated reasons. He was discharged under honorable conditions.

After his discharge he worked as a commercial fisherman until 1967 in the Bradenton-Palmetto area. In 1967 and 1968 he worked as a guide at Homossassa and then in 1968 worked in construction work as a carpenter. He has worked as a union carpenter since that time.

His first marriage was in 1958 when he was 24 years old and his wife was 21. The marriage lasted for 7 years and there were no children from that marriage. The last 3 years of the first marriage were marked with many disagreements and arguments and he left his wife after seven years. He married his second wife and last wife in 1966 when he was 33 years old and she was 21 years old. The couple have 4 children ages 5, 4, 3 and 7 months. Mr. Gardner said that his marriage was wonderful and that he and his wife seldom argued until March, 1973 where his mother-in-law moved next door to them. He described his mother-in-law as alcoholic and that things in the marriage started to go bad from that time on. Approximately 3 weeks before the time of the alleged crime his wife and a stepbrother went out partying until 4:00 a.m. and he suspected that she had had sexual relations with him. He left her the next morning but returned after a few hours and talked it out and agreed to go on together for the children's sake.

HEALTH HISTORY: Mr. Gardner denied any operations and any serious illnesses. In 1953 he had a broken collar bone subsequent to a car wreck while drinking and at which time he was knocked unconscious only briefly. At age 14 years he had his right shoulder broken when he fell out of a tree. At age 13 years he fell 8 feet onto his head and said that he "acted crazy and out of his mind for 3 days" but was not hospitalized and did not see a doctor.

He was unconscious one other time in 1957 when he was knocked out in a fight for 10 minutes at which time he had some broken facial bones but he was not hospitalized and received no medical treatment for that either. He denied any venereal disease or any epilepsy. He denied any suicidal attempts and stated that he had never had any

psychiatric treatment or psychiatric hospitalizations. He said that one year prior to this examination after some heavy drinking he thought he saw a snake in a tree but it just turned out to be moss. He denied any other hallucinations or illusions. He did say that he had felt the need for therapy for the past 4 to 5 years because of nervousness, bad memory, and easy to anger on the job.

Concerning illegal drug use he said that he had only smoked marijuana twice and denied the use of any other drugs. He started drinking alcohol when he was 16 years old and began to drink regularly and heavily every weekend from a six-pack to a case of beer. In 1956 after his discharge from the service he began to drink heavier and for 1 year drank daily either whiskey, beer or wine. His drinking in the last 4 years has been that he gets drunk each time he went out on beer and whiskey. The frequency of this was usually every weekend. He denied having delirium tremens but thinks he has had the alcoholic shakes many times. Beginning in the past year he said that his drinking increased and that he would drink if it were there whether he really wanted it or not. He started going on 2 to 3 day drunks which were interrupted by 1 to 2 week dry spells. He would usually drink with friends while they rode around in cars. He felt that his drinking had affected his memory in the past 4 years. He reported that his sister was alcoholic, that his natural father was a heavy drinker and that his youngest half-brother was also a heavy drinker. He has never had Antabuse treatment for his alcoholism.

MENTAL STATUS: Mr. Gardner is a man who appears his stated age. He shows a full range of affects throughout the interview. He is oriented to place, person and situation and is oriented to date, day and year but says that it is October instead of November. His recent memory as tested on this examination was good and his remote memory was moderately impaired. His general fund of information would place him in the average range of intellectual abilities. He was able to do mental calculations and mental problems moderately well. He was able to abstract 5 proverbs presented to him and there was no bizarreness in the interpretations. When presented with 3 problematical social

situations in which he might find himself he was able to provide appropriate solutions which indicated an adequate degree of intellectual social judgment. There were no evidences of hallucinations or delusions during the examination and no evidence of a thinking disorder, particularly, no loosening of associations. No bizarre behaviors nor mannerisms were noted. His draw-a-person test showed a figure that was well formed and executed. He does not demonstrate any undue anxiety but he does show evidence of a clinical depression. He stated that he feels "a terrible depression" which has interfered with his sleep and which makes him jittery and nervous. He has not been able to cry although he believes that he has grieved the death of his wife although to him it does not seem possible. He does not think that he could have killed his wife even if he were drunk at the time and thinks that she may have bled to death from an injury to her liver when she fell on that night. He feels a need for medications for his nerves and for his depression.

SUMMARY AND CONCLUSIONS: Mr. Gardner is a 39 year old, white, widowed man who is charged with first degree murder. On psychiatric examination there is no indication of psychosis and it is my medical opinion that he is competent at the present time and able to assist his attorney in the preparation of his own defense. Further, it is also my medical opinion that had he not been under the influence of alcohol he would have been competent at the time of the alleged crime, knowing right from wrong and capable of adhereing to the right. Mr. Gardner is at the present time clinically depressed and I would recommend anti-depressant medication. Because of his history of alcoholism I would recommend that he be provided with treatment for his alcoholism on an outpatient basis once he is released.

Frank Carrera, III, M.D.

[Trial Transcript, *State of Florida v. Daniel Wilbur Gardner*, before Hon. John W. Booth, Circuit Judge, at Inverness Citrus County, Florida, beginning January 7, 1974.]

MR. OLDHAM [State Attorney]: Let the record reflect that the State has made full disclosure to counsel for the defendant in this particular case without formal order of the Court, freely and voluntarily, they have deposed the witnesses and examined the State's evidence, this is stated in the record since no motions were filed, but it was done freely and voluntarily by stipulation of counsel.

[II-6—II-156: Jury selection.]

THE COURT: Mr. Fitzpatrick, would you and Mr. Oldham come up, please?

(WHEREUPON, at the bench, Mr. Fitzpatrick requested that the paragraph on page 5 of the instructions with regard to the defendant not testifying be given by the Court)

WHEREUPON, discussion at the bench ended.

MR. FITZPATRICK: The defense request the rule be invoked, your Honor.

MR. OLDHAM: List of possible witnesses, your Honor, for the State: Lloyd Shelton, Walter Owezarak, Glenda Mae Denny, Beulah Ogle, Kelvin Melvin, Alvin Loenecker, David Merkerson, Mary Merkerson, Mary Frances Elliot, David Chancey, Richard Binaker, Herb Williams, Susan Merkerson, Joe Berhnam, George Hanstein, Nellie Merkerson, Bob Teese, Evelyn Merkerson,—Bob Teese took some photographs, and he is on call, your Honor—Travis Smith, and Dr. Shutze—he is a pathologist, he is on call, your Honor, I will be responsible for them being under the rule.

THE COURT: Does the defense have any witnesses?

MR. KOVACH: Wayne Richie, your Honor. I don't believe he is in the court room, your Honor.

THE COURT: You will be responsible for Wayne Richie?

MR. FITZPATRICK: He is on the State's list, your Honor

THE COURT: All right. The rule has been invoked—this means all of you will have to leave the court room, except the particular witness who is testifying, you cannot discuss the case among yourselves or with anyone else, or discuss the proceedings that take place during this trial except with the attorneys of record, Mr. Oldham, Mr. Green, Mr. Fitzpatrick or Mr. Kovach. All of you understand this? You will all leave at this time.

WHEREUPON, all witnesses departed from the court room.

THE COURT: Mr. Oldham, would you and Mr. Fitzpatrick come up please?

(AT THE BENCH: Let the record reflect that the court

order the court room cleared of all spectators. The preliminary instructions will be given, upon giving the preliminary instructions, the spectators will be permitted to return after they have been searched. This is with the consent of the state and the defense attorney. [)]

WHEREUPON that ended the conference at the bench.

WHEREUPON, the court room was cleared of all spectators.

WHEREUPON, the jury was brought into the court room and seated in the jury box.

THE COURT: Ladies and gentlemen of the jury, you have been selected and sworn as a jury to try the case of the State of Florida vs. Daniel Wilber Gardner. The defendant is charged by an indictment filed in this court on August 22, 1973, charging him with murder in the first degree. The elements of this offense will be explained to you later. It is your solemn responsibility to determine the guilt or innocence of this defendant, and your verdict must be based solely on the evidence as it is presented to you during this trial, and the law on which the court instructs you at the close of the trial. The jury is concerned with the facts, the court is concerned with the law. The court is concerned with the facts only to see that they are properly and lawfully presented to the jury. The jury is concerned with the law only as the court instructs them on the law at the close of the trial. Thus the province of the jury and the province of the court are well defined in [that] they do not overlap. This is one of the fundamental principles of our system of justice. Before proceeding further it is necessary that you understand how a trial is conducted. First the attorneys will have an opportunity to make their opening statements. The opening statements are not evidence, but they are to be considered only as a guide so that you may better understand and evaluate the evidence as it comes to you. Following the opening statements, witnesses will be called to testify. They will be placed under oath and then examined and cross examined by the attorneys. Documents and other tangible exhibits may also be produced as evidence. When the evidence is completed the attorneys will argue the merits of the case. What the attorneys say is not evidence.

Their arguments are persusaive [sic] only and their arguments may be accepted or rejected in whole or in part as you see fit. These arguments are given for the purpose of assisting you in evaluating the evidence, and arriving at correct decision concerning the facts. Following the arguments of the attorneys, the court will instruct you on the law that you are to apply to this case. After the instructions are given the alternate jurors will be released and you will then retire to consider your verdict. Throughout the trial you should remain alert and listen attentively—you should remember all the evidence as clearly as possible but you should not form any definite or fixed opinion on the merits of the case until you have heard all the evidence, the arguments of the attorneys, and the instructions on the law by the court. Until that time you should not even discuss the case among yourselves. In the course of the trial, the court will from time to time take recess. During these recesses you will not discuss the case with anyone nor permit anyone to say anything to you in your presence about the case. If anyone attempts to say anything to you, or in your presence about the case, tell them that you are on the jury trying the case and ask them to stop. If they persist, leave at once and report the matter to me upon your return to court. Such conduct on their part would be contempt of court to be punished as such. You are instructed not to visit the scene of the alleged crime. Should it be necessary for you to view the scene, you will be taken there as a group under the supervision of the court. You are instructed not to read, listen to nor watch any news reports of this trial. The evidence comes to you only in the court room and it must be considered by you free from any outside influence. News reports are not limited to the evidence and may contain material which is of no concern whatsoever to you which might tend to influence you one way or the other. The case must be tried solely upon the evidence produced in the court and in the presence of all the jurors, The defendant, the attorneys, and the Court. The indictment is not evidence. It is merely the means whereby the State charges a crime and it carries no inference of guilt whatsoever. The evidence is the testimony of the witnesses and the docu-

ments and other tangible things which may be produced and admitted into evidence. Now the defendant may or he may not testify during the trial. At no time is a defendant in a criminal case required to prove his innocence, or furnish any evidence whatsoever—this right is guaranteed to all defendants by the constitution and no other right is more thoroughly engrained in our system of justice. The decision to testify or not to testify is his alone to make, and the jury cannot draw any inference of guilt whatsoever from the failure of the defendant to take the witness stand on his own defense. The attorneys are trained in the rules of evidence and trial procedure, and they are obligated and in fact, it is their duty to make all objections that they feel are proper and necessary concerning the evidence and the conduct of the trial. When an objection is made you should not speculate on the reason why it is made. Likewise when an objection is sustained, you must not speculate on what might have occurred had the objection not been sustained, nor what the witness might have said had he been permitted to answer.

THE COURT: Mr. Bailiff, would you step to the rear and let [in] the spectators?

(Whereupon, spectators were searched and permitted to return to the court room)

MR. OLDHAM: Ladies and gentlemen, as the court told you, at this time it is proper for myself and Mr. Fitzpatrick to make opening arguments to you. Actually it is not an argument but basically what we think the evidence will show from the witness box, from our respective sides in the case. If I should say anything to you that does not come from the witness box, you take what came from the witness box rather than what I say. I think that the evidence will show that this defendant was married to Bertha Mae Gardner, they were both of the white race, that her approximate age was twenty-six, and she was five feet and weight ninety pounds. I think the evidence will show the defendant was about six feet and weighed a hundred and eighty pounds. I think the evidence will show that on the night in question which was a Friday night, June the 29th, going into the 30th of June, this defendant and his wife had been out, the

children were with a neighbor, they arrived back home about 11:30 or 11:45 that particular night. That they lived in Homosassa, Florida, and when they arrived home, the deceased's mother lived next door, and at the deceased's mother's house she was entertaining a male friend that they had been drinking some beer, that not too long after the defendant and his wife arrived home, they noticed that the defendant came to the mother in law's house, he was dragging his wife by the hair and beating her, he knocked the door down, came in and struck his mother-in-law and knocked her out, that the other gentleman that was there with her heard him say he was going back home and beat his wife up. We think the evidence will show that impartial neighbors in the general area heard this woman scream that night and begged him not to beat her any more, that early the next morning he went over to his mother-in-law's house and told her that she had better get over to see her daughter, that she wasn't breathing right, he told his mother when she arrived at the house that he had beat his wife because she wouldn't tell him where the children were. I think that when the ambulance driver got there and officers that this woman was lying on the bed, that her hair was in various places throughout the house where it had been pulled out, that the ambulance driver when he saw her asked where her wig was, he thought she didn't have any hair, that the defendant then got into the police car with the officers and his wife was taken to Leesburg for a pathology report, that at that time the officers took the clothes of the deceased, picked up certain samples of her hair, took the bed sheets, took the clothes of the defendant, I think expert testimony will show that her blood type was on all of these things. I think that it will further show that she had no . . . [clothes] on, when they arrived there, certain of her clothes were badly torn and so forth, one of the items found there was a whiskey bottle that had blood on it. I think the pathologist will testify that this woman was probably beaten worse than any he had ever seen, that she had multiple contusions of the scalp, face, chest, abdomen, and back. She had multiple lacerations on the skin of her face, and as I said, most of her hair was pulled out. He will

also testify that her pubic bone, that an object, a large object, had been forced or rammed into the private parts of her body, and that naturally fractured the liver, that there were also numerous hemmorages on the mouth and other bruises and marks on her I think that based upon that this defendant was arrested and charged with the premeditated killing of his wife. I think those are basically the facts that you will hear. Thank you.

MR. FITZPATRICK: May it please the court, and ladies and gentlemen of the jury, at this time, defense waives opening statement.

MR. OLDHAM: At this time, your Honor, I would like to mark certain things for identification purposes only. Could we ask Mr. Smith to come in, who has had custody of the things that went to the laboratory. Mr. Charlie Smith. I would like to mark this State Exhibit Number 1 for identification; this is State Exhibit Number 2 for identification;

THE COURT: Mr. Bailiff, escort the jury to the jury room while these exhibits are being marked.

WHEREUPON, the jury was escorted to the jury room.

MR. OLDHAM: These are all photographs, your Honor.

WHEREUPON, State Exhibits 1 through 27 were marked by the Clerk for identification, all being photographs; State Exhibit Number 28, identification, marked by the Clerk, (Shirt); State Exhibit number 29 for identification marked by the Clerk, (shoes), State exhibit number 30, identification marked by the Clerk (whiskey bottle); State exhibit number 31 for identification marked by the Clerk (bag of victim's clothing); State exhibit number 32 for identification marked by the Clerk (Bed linens) State Exhibit number 33 marked for identification by the Clerk (hair) State Exhibit number 34 for identification marked by the Clerk (Hair); State exhibit number 35 for identification, marked by the Clerk (finger nail scrapings).

THE COURT: From this point on, no spectators will be permitted to enter or leave the court room except during recess. Now I would like to admonish the spectators that there is to be no outburst or visible displays of emotions by any of the spectators. If such an outburst or visible display does occur, you will be subject to being held in contempt of

court. All spectators, attorneys and court officials will remain seated until the court officially announces that court is in recess. Bring the jury in please.

WHEREUPON the jury was returned from the jury room and seated in the jury box in the court room.

WHEREUPON, the witness, Glenda Mae Demney was called by the state, and having been sworn, testified as follows:

DIRECT EXAMINATION BY MR. OLDHAM:

Q. Would you state your name and address to the ladies and the gentlemen of the jury, please mam?

A. Glenda Mae Demney 2915 Ivy Street, Tampa, Florida.

Q. And where did you live on the 29th and 30th day of June, 1973?

A. Homosassa, Florida, Mason Creek Road.

Q. How long had you been living there, mam?

A. Little over a year, I guess.

Q. What relation to you was Bertha Mae Gardner?

A. She was my daughter.

Q. And, do you know the defendant in this cause?

A. Yes, I do.

Q. What relation to you was he, mam?

A. Son-in-law.

Q. And that is Daniel Wilber Gardner?

A. Yes, sir.

Q. Where did you live in relation to where they lived on the 29th and 30th of June, 1973?

A. Right beside them in another trailer.

Q. They lived in a trailer?

A. Yes.

Q. And you lived in a trailer?

A. Yes.

Q. And was their trailer and your trailer located in Citrus County, Florida?

A. Yes, sir.

Q. Did you have occasion to see your daughter on the evening of the 29th day of June, 1973?

A. Yes.
Q. What was the size of your daughter?
A. You mean how big was she?
Q. How tall was she, about how much did she weigh?
A. Well, I would say she was about Five-one, maybe the most she would weight a Hundred and One pounds, maybe not that much. Usually it was ninety-eight pounds.
Q. Now, you say that you did see her on the 29th?
A. Yes, sir.
Q. Did you see her in the afternoon, evening, or what?
A. In the evening.
Q. About what time?
A. I would say around Seven o'clock, Six-thirty or Seven.
Q. Where did you see her?
A. At home.
Q. Did you see him at that time?
A. No, sir.
Q. When you saw her at home, did you and she go any where?
A. Not right then, no, sir.
Q. Later on, did you go somewhere?
A. Yes, sir.
Q. About what time did you go?
A. Well, it was after dark—I didn't look at the clock, so I couldn't tell you exactly what time it was.
Q. Where did you go?
A. Went to my youngest son's.
Q. Did anybody go with you and your daughter?
A. Yes, sir.
Q. Who?
A. Mary Elliton.
Q. Who is Mary Elliton?
A. She is my ex sister-in-law, my daughter's aunt.
Q. And how long did you stay at your son's?
A. Just long enough to drop the two children off.
Q. And then where did you go?
A. Went out to the Sugar Mill.
Q. Is the [S]ugar Mill and place where there is a bar, or a resturant, or what?

A. Yes, sir, it is a bar.
Q. Did your daughter go in the Sugar Mill?
A. We let her out, she went in the Sugar Mill.
Q. What time was that?
A. I would say around Eight, Eight-thirty. Something like that, maybe Nine.
Q. Up to that time, had you had anything to drink?
A. I had had a couple of beers.
Q. What about your daughter?
A. She had one beer with me.
Q. Now, where did you go after you let your daughter out at the Sugar Mill?
A. I went back home.
Q. Did you see him in the Sugar Mill at that time?
A. No, sir, I didn't go in the Sugar Mill.
Q. Was she looking for him?
A. Yes, sir, she was.
Q. Now, did you have occasion to see your daughter or your son-in-law any more that night or early the next morning?
A. Yes, sir.
Q. When and where did you see them?
A. My daughter came back out to my trailer, told me she was out of cigarettes.
Q. What time was this?
A. Oh, I don't know, I would say around Ten o'clock, Ten-thirty, something like that. So, I borrowed some money off a friend of mine, I guess she went up to the Jiffy, I guess she got herself a pack of cigarettes and got me a pack. She come back out to the trailer . . .
Q. You are talking about your trailer?
A. My trailer. And I asked her where she was going and she said she was going to look for her husband.
Q. This was about Ten or Ten-thirty, you say?
A. Yes.
Q. Did she have anything to drink in your presence at that time?
A. Not as I know of.
Q. Who was with you at the trailer, now?
A. Buckshot.

Q. What is his name?
A. Calvin Loenacker, is all I know—
Q. This is a male friend?
A. Male.
Q. Now, did you see your daughter or your son-in-law any more that night?
A. Yes, sir.
Q. Tell the ladies and gentlemen what you say, if anything?
A. Well, I don't know exactly what time it was, but after my daughter left, I told her to be careful, she said she would, she said she was going to go look for him and bring him home. I sat there at my kitchen table, Buckshot too . . . I had just fixed my lunch, had it ready for the next morning, sat there sipping on a beer, and all of a sudden here comes the door, hinges and all in. And my son-in-law was behind it. He broke down the door, hit me one time and out I went.
Q. Where did he hit you?
A. Hit me on the side of the face.
Q. Did he knock or anything before he came in?
A. No, sir.
Q. What kind of door was that?
A. Well, it was just a regular door, wasn't a metal door or nothing like that.
Q. Did you hear him coming up?
A. No, sir.
Q. Do you know whether your daughter was outside with him or not?
A. No, sir.
Q. Did he say anything to you before he hit you?
A. Not as I recall.
Q. He knocked you out, is that right?
A. He knocked me out.
Q. Now, you say this friend of yours named Buckshot was there at this time?
A. He was sitting right there.
Q. Do you know what he did or said after that?
A. I don't know what he said after that because I was completely unconscious.

Q. Did anyone take a photograph of you after that?
A. I don't think so. I know they was taking pictures at the trailer.
Q. I show you State Exhibit Number 14, that is not you, is it?
(Witness looks at photograph)
WITNESS (continuing)
A. Yes, that's me.
Q. I show you State Exhibit number Fifteen (15) marked for identification and ask you if you know who that is?
(Witness looks at photograph)
WITNESS (continuing)
A. That's myself too, I was in a walking cast at the time.
Q. I show you State Exhibit Number Sixteen marked for identification and ask you who that is?
(NOTE: Exhibit actually shown was number 26 and not 16)
(Witness looks at photograph)
WITNESS (continuing)
A. That's my daughter.
Q. Thank you. Now, did the defendant come to your trailer the next morning?
A. Yes, sir.
Q. About what time did he get over there?
A. Well, I usually get up around 6, 6:30 or 7:00. I was just fixing to fix some coffee and he told me to come over and check on my daughter, said my G.D. Daughter, said she wasn't breathing right. But he just didn't say G.D.
Q. He didn't say that?
A. He didn't. I better come and check on her 'cause she was not breathing right.
Q. Did you go next door?
A. Yes, sir.
Q. Did you see your daughter?
A. Yes, sir.
Q. What was her condition when you saw her?
A. Strip naked on the bed, bruises on her face—he wanted me to slap her face, call her, and I said 'I will not, I will call her but I won't slap her', and I just touched her and

told him he had better call an ambulance, I didn't know if she was unconscious or not.

Q. Did he say anything to you?

A. He didn't say nothing to me, he kept mumbling from the front door to the bed room.

Q. Did you wait for the ambulance to come?

A. Yes, sir.

Q. Could you tell whether she was alive or dead at that time?

MR. FITZPATRICK: Defendant objects, calls for conclusion.

THE COURT: Objection sustained.

MR. OLDHAM (continuing)

Q. Was the defendant drinking that morning when you saw him?

A. Not as I know of.

Q. Did he seem intoxicated to you?

A. No, he didn't.

Q. What about that night before when he came in your trailer and struck you, could you tell whether he was drinking or whether he wasn't or anything at that time?

A. He had been drinking but he was not drunk.

Q. Had you been drinking?

A. Yes, sir, I had drank about three beers.

Q. And the man that was with you, how many beers had he had?

A. He had a bottle of whiskey.

Q. The friend that was with you?

A. Yes. I asked him what on earth he was doing out there and he said he come out to talk to me, and I said 'well, I'm fixing to drink me a couple beers and go to bed'.

Q. Where do you work?

A. I'm not working anywhere now. At that time I was sitting on a vegestable [sic] stand for Edward Melcher.

Q. What time did you go to work every day?

A. Sometimes I had to go down there at Four o'clock to go with him to the Farmers Market in Tampa, sometimes it was Six-thirty, Seven.

MR. OLDHAM: You may inquire.

CROSS EXAMINATION BY MR. FITZPATRICK:

Q. Mrs. Demney, is that how you pronounce your name?

A. Yes.

Q. Mrs. Demney, I noticed that you are on crutches—how did you hurt your foot? or leg?

A. How did I hurt my foot again?

Q. Yes, mam.

A. I stepped on a rock and just twisted it the wrong way. It wasn't well.

Q. Mrs. Demney, when did you have your first beer on the date of June 29th?

A. Sir?

Q. When did you have your first beer on the date of June the 29th?

A. After I got home, after Ed Melcher had let me out.

Q. That was about Seven o'clock?

A. I would say around about Seven-thirty or Eight o'clock.

Q. You don't really know what time it was, do you, when you got home?

A. I'm not too good looking at watches or clocks unless I'm going to work.

Q. You had your first beer when you got home at Seven thirty?

A. About Seven thirty.

Q. And where did you get that beer from, [M]rs. Demney?

A. Stopped out there at the Quick-way at Homosassa Springs, bought me some cigarettes, my daughter didn't need the money that day, bought me some cigarettes and a six pack of beer.

Q. Were you driving, Mrs. Demney?

A. No, sir.

Q. Were you walking?

A. You mean when I went home?

Q. Yes.

A. No, Ed Melcher taken me home.

Q. And you had your first beer around Seven thirty or Eight o'clock?

A. Seven thirty, Eight o'clock.

Q. And I believe you testified that the next time you had a beer was when Buckshot came over to your house?

A. Yes, sir.

Q. Mrs. Demney, isn't it a matter of fact that you had a beer with your daughter before Buckshot got there?

A. I just said that she drank one beer.

Q. Was Buckshot there with you then?

A. No, Buckshot wasn't with me there then.

Q. Then that was your second beer?

A. No, after my daughter left, Buckshot come out there and I wanted to know what on earth he was doing at my trailer . . .

Q. So when your daughter was there, you had another beer, didn't you?

A. Yes.

Q. So that would be two beers, right?

A. That's right.

Q. And then Buckshot got to your house?

A. That's right.

Q. And he brought a bottle of whiskey?

A. That's right.

Q. Did you drink whiskey with him?

A. I sure didn't.

Q. Do you?

A. No, sir.

Q. You never had a drink of whiskey in your life?

A. Oh, yes, I've had a drink of whiskey in my life, but I cannot stand whiskey.

Q. Did Buckshot bring anything besides whiskey over to your house?

A. That's all he brought.

Q. How many beers did you have after Buckshot got there?

A. I would say about one.

Q. You had one, then you had three left in the refrigerator?

A. I had one and I was drinking one when the door come down.

Q. What time did the door come down?

A. I couldn't pinpoint the time, because I didn't look at my clock.

Q. Just try, Mrs. Demney.

A. I judge it was around Eleven, or Eleven-thirty when the door came down.

Q. So, Buckshot arrived around Ten o'clock I think you said?

A. He arrived shortly after my daughter dropped off at the Sugar Mill.

Q. And between that time and Eleven thirty, or whatever time you say it was, you had one more beer?

A. That's right.

Q. How much did Buckshot have to drink?

A. I couldn't say how much he had to drink, I was fixing my lunch.

Q. You wasn't particularly paying any attention to Buckshot?

A. We had conversation and that's all.

Q. Beg your pardon?

A. We had conversation and I was fixing my lunch at the same time and that's all.

Q. You said he came over there to talk to you about something, is that correct?

A. That's right.

Q. What did you all talk about?

A. I've known Buckshit, Buckshot ever since I've been a little kid.

Q. You asked him what he wanted, what did he say?

A. He said he come around to keep me company and talk to me.

Q. And the time that the door broke down that you were talking about, Buckshot was still there and he was drinking his whiskey and you were drinking your beer?

A. When that door was broke down, I was so shocked and disturbed, I don't know whether he was drinking whiskey at the time or not.

Q. I'm talking about between the time that he got there, Mrs. Demney, and the time the door broke down.

A. I guess he was drinking whiskey.

Q. But you didn't pay any attention to how much?

A. No.
Q. You were making your lunch at that time?
A. Like I say, I was making my lunch.
Q. From the time that Buckshot got there until the door come down?
A. That's right.
Q. And that was approximately an hour and a half?
A. Uh-huh.
Q. Mrs. Demney, isn't it a matter of fact, that this defendant Gardner, came to your house and knocked on the door, and you opened the door and you and he had a good fuss because he didn't know where his children were?
A. No, sir.
Q. And you slammed the door?
A. No, sir.
Q. That is not true?
A. That is not true.
Q. Isn't it a matter of fact that he then kicked the door and the door flew open and hit you and the door knocked you down?
A. No, sir.
Q. You are testifying here under oath that he came . . . .
MR. OLDHAM: Objection, your Honor, the witness has answered the question. He is arguing with the witness now.
MR. FITZPATRICK: Your Honor, I'm not saying what I was asking her, but it is not something that had been answered.
THE COURT: Well, go ahead and ask the question.
MR. FITZPATRICK (continuing)
Q. You are saying that he came in knocked the door down and knocked you out with his fist?
A. He broke down the door, hinges and all and knocked me out with his fist, and kicked me in the end of my spine, and the door didn't do that.
Q. Who fixed the door, Mrs. Demney?
A. It was not fixed when I went to the hospital, it was laying inside the trailer.
Q. Is it fixed now?
A. Yes, I guess it is, they burnt both trailers up.
Q. Who burnt them up?

A. I guess his folks.
Q. You mean those two trailers . . .
A. The trailer, and cabana, that my daughter and son-in-law lived in and the trailer I lived in, they burnt them up.
Q. Where are your four grandchildren now?
A. They are with David and Libby Merkerson.
Q. Who are they?
A. They are Wilber Gardner's half brother and half sister-in-law.
Q. Now, Mrs. Demney, isn't it a matter of fact that you and Buckshot had been sitting there drinking for some time, ...
A. No, sir.
Q. And when Mr. Gardner got there both of you were highly intoxicated and you had the fight?
A. No, sir. I didn't have no chance to fight. To defend myself either.
Q. He just broke in for no apparent reason?
A. Right.
Q. And you and he hadn't been fighting earlier in the day?
A. No, sir, I hadn't even seen him.
Q. And he lived right next door to you?
A. Yes.
Q. And he broke in and for no reason he knocked you out?
A. That's right.
MR. FITZPATRICK: Thank you, Mrs. Demney.
MR. OLDHAM: No further questions, you may step down.
WHEREUPON, the witness, GLENDA MAY DEMNEY was excused from the witness stand.
WHEREUPON, the witness, ALVA LOENECKER was called by the State and having been sworn, testified as follows:
DIRECT EXAMINATION BY MR. OLDHAM:
Q. Would you state your full name and address for the ladies and gentlemen of the jury?
A. Alva Loenecker, General Delivery, Homosassa, Florida.
Q. What is your profession or occupation?

A. I'm a commercial fisherman.
Q. How long have you been a commercial fisherman over there?
A. I guess about thirty-five, forty years.
Q. Do you know the defendant in this case, Daniel Wilber Gardner?
A. Yes, sir, as good a friend as I ever had.
Q. How long have you known him?
A. Ever since he was a kid.
Q. What about his wife, now deceased?
A. I knowed her.
Q. How long had you known her?
A. Ever since she was born.
Q. And, did you know her mother too?
A. Yes, sir.
Q. Did you have occasion to be at her mother's house on the 29th day of June, 1973?
A. Yes, sir.
Q. About what time did you get there, sir?
A. I imagine I got there about Seven thirty.
Q. Was her mother there?
A. Yes, sir.
Q. How long did you stay there?
A. Well, I was there when Mr. Gardner come back.
Q. About what time was that?
A. Around Eleven or Eleven-thirty.
Q. And were you drinking anything?
A. Yes, sir, me and Mrs. Demney had a drink there.
Q. What were you drinking?
A. We had a drink of whiskey.
Q. Did she drink whiskey too?
A. Yes, sir.
Q. What happened, then, about Eleven or Eleven thirty?
A. Mr. Gardner come, drug the door off the trailer. He come in and hit Glenda Mae and knocked her out on the floor, and I asked him not to do that no more.
Q. O.K., what did he do then?
A. Said he was going back and beat hell out of his wife, and I said 'please don't do that Bill'.
Q. Do you know whether he did or not?

A. No, sir, I do not.
Q. Did you see him?
A. No, sir.
Q. Did you see her?
A. I seen her, she was at the door at the trailer, and he put her down like that there and went to pulling her head, and she said 'please don't hit me no more', it could have been her that said it, now, or could have been the T.V. was playing loud.
Q. She was outside the trailer when he . . .
A. She was standing on the step, the trailer there, and the light was shining out.
Q. O.K. You say you have known her since she was born too?
A. Yes, sir.
Q. Did you say he caught her by the hair?
A. They was in the door, like that—
Q. Did you see him or her any more?
A. No, sir, not 'til the next morning. I saw him, he come back. I went in and got Glenda Mae up and set her on the bed and washed her face. And he come back. And he said he wanted to jump on Glenda Mae again and I said 'no', and he said 'this was his trailer', and I said 'Glenda Mae is buying the trailer', and he said 'no, it's mine', and I said 'well, I'll go home', so I went back in the trailer and he went on back to his house.
Q. How long was it after he had been over there the first time was it until he come back?
A. I guess maybe thirty, thirty-five minutes.
Q. Did he tell you why he wanted to beat this woman up?
A. No, sir.
Q. Did he tell you why he was going to beat his wife up?
A. No, sir.
Q. But, he didn't attack you or anything like that?
A. No, sir. Just said 'Bill you done wrong', and he said 'yeah, I believe I have', because me and him been good friends.
Q. Now, when did he say this?
A. Right there at the door of the trailer, I was standing at the door and he was outside the trailer.

Q. Was this on the second occasion?
A. Yes, sir.
Q. Said he thought he had done wrong?
A. Yes, sir, by hitting Glenda Mae.
Q. Huh?
A. Bout hitting Glenda Mae.
Q. But he didn't bother her the second time?
A. No, sir.
Q. Did she say anything or do anything to him that would require him to hit her?
A. No, sir, I couldn't tell you.
Q. Were you intoxicated?
A. No, sir.
Q. Did you have occasion to go over to his trailer where he and his wife lived the next morning?
A. He come to the trailer and called me, said something was wrong with his wife.
Q. Did you stay at her trailer all night?
A. Yes, sir, I made a pallet there on account of Glenda Mae's face all skint up.
Q. Skint up where he hit her?
A. Yes, sir.
Q. So he came over the next morning,
A. Yes, sir.
Q. And . . .
A. He said something has happened to my wife, that I can't get her awake, looks like she has took some dope.
Q. And did you go over there?
A. Yes, sir, Glenda Mae got up and come on out the trailer, and I kind of helped her down the steps, and he went in first, and I helped Glenda Mae back into his house, and I come on behind her.
Q. Did you see his wife when you got over there?
A. Yes, sir, I seen her, he had her up in his arm and her head over here, and that's all I could see. And he said 'I can't understand why my wife won't wake up, looks like she's'—said 'have I killed her or is she dead', and I said 'she looks like she is dead', and he asked me to go call the ambulance, and then I went and got his mother.
Q. You went and got his mother?

A. Yes, sir, went and called her.
Q. I show you State exhibit number Twenty Six (26) marked for identification.
(Witness looks at photograph)
A. Yes, sir.
Q. What?
A. Shows her there naked.
Q. Who?
A. Glenda Mae—I mean Bill Gardner's wife.
Q. Is that how she looked when you went over there that morning?
A. No, sir.
Q. How did she look when you went over there?
A. Like I say, Glenda Mae was in front of me, and like she was on this side and I was on this side and all I could see was her head.
MR. OLDHAM: You may inquire.

CROSS EXAMINATION BY MR. FITZPATRICK:

Q. Buckshot, have you ever seen that picture before?
A. No, sir.
Q. Let me try to get something straight in my mind—you were at Glenda Mae's the morning after the door was busted in, right?
A. Yes, sir.
Q. What time was that?
A. I imagine it was around Seven o'clock when he called me.
Q. Had you been home?
A. No, sir.
Q. You stayed there all night?
A. Yes, sir.
Q. Your last name is Loenecker?
A. Yes, sir.
Q. Buckshot, you came to Glenda Mae's house about Seven thirty in the evening, is that right?
A. Yes, sir.
Q. You and she was just sitting around talking, one thing and another—

A. Yes, sir, and listened to the Grand Old Opry on the radio.

Q. Pretty good program to listen to?

A. Yes, sir.

Q. Did she have any beer while you were there?

A. Well, Glenda Mae—I give Glenda Mae three dollars and Mr. Gardner's wife went down and bought six pack of beer.

Q. That was after you were there?

A. But I didn't drink none of the beer.

Q. You saw Bertha drink a beer?

A. Yes, sir.

Q. And you gave Glenda Mae some drinks?

A. Bertha Mae brought it in and set it on the table.

Q. You mean the jug of liquor?

A. No, sir, the beer.

Q. The beer. What kind of whiskey did you bring over?

A. I brought some Ten High.

Q. A fifth of Ten High?

A. No, sir.

Q. Pint?

A. Pint.

Q. So between Seven thirty and Eleven thirty, you and Glenda Mae just sat around and drank Ten High and . . .

A. No, we did not drink all of it, we only had two drinks.

Q. She had two?

A. Yes, sir.

Q. Was any of the beer missing when the door crashed in? Did she drink any of the beer?

A. She drank one.

Q. She drank one beer?

A. Yes, sir.

Q. And you had two drinks of whiskey?

A. Yes, sir.

Q. Now, you say he came over the first time—what did he say when he came over the first time?

A. Never said anything, just jerked the door down.

Q. He jerked the door down?

A. Yes, sir. Just jerked the door down and come in.

Q. The door sort of flew open on the hinges?

A. Well, the door, was kinda' like that door over there, made out of plywood—

Q. It just flew open on the hinges?

A. No, it come on off.

Q. It came off of the hinges?

A. Yes, sir.

Q. He give it a pretty good lick then, didn't he?

A. It come on the outside.

Q. Oh, he had to pull it?

A. Yes, sir.

Q. He didn't kick it down?

A. No, sir.

Q. But then he went on back home after he beat up on Glenda Mae?

A. Yes, sir.

Q. He didn't say why he was over there, did he?

A. No, sir.

Q. Just broke the door down, for no apparent reason, and beat up on her?

A. Yes, sir.

Q. And when he came back the second time, you said he said he was going to beat up on Glenda Mae some more?

A. Yes, sir.

Q. What did she say to him?

A. Didn't say nothing, she was in the bed.

Q. Was she asleep?

A. No, sir,—he had hit her pretty hard.

Q. And he came back about thirty minutes later?

A. Thirty, thirty-five minutes later.

Q. What did Glenda Mae get up that night?

A. Glenda Mae didn't get up.

Q. When you went to bed, where was she?

A. She was back there in the trailer, and I went up there and laid down in the other room there.

Q. And you don't remember anything until the next morning?

A. No, sir, not until he called me.

MR. FITZPATRICK: That's all.

MR. OLDHAM: No further questions of this witness.

WHEREUPON, the witness was excused from the wit-

ness stand. WHEREUPON, the witness, NELLIE MERKERSON was called by the State and having been sworn, testified as follows:

DIRECT EXAMINATION BY MR. OLDHAM:

Q. Would you state your name and address for the ladies and gentlemen of the jury?

A. My name is Nellie Merkerson, my address is Rte. 1, Box 35, Homosassa, Florida.

Q. What relation is the defendant to you?

A. I am the mother of the defendant.

Q. Did you happen to go over to his trailer on the morning of the 30th day of June, 1973, where he and his wife were living?

A. I did.

Q. And prior to going over there, did you see this fellow called 'Buckshot', or whatever his name is?

A. I did.

Q. Did he come to your house?

A. Yes.

Q. For what purpose did Buckshot come to your house?

A. He said that . . .

MR. FITZPATRICK: To which the defendant objects, hearsay.

MR. OLDHAM: I will withdraw the question.

MR. OLDHAM (continuing)

Q. He did come to your house, is that right?

A. Yes, sir.

Q. As a result of his coming to your house what did you do?

A. I went over there.

Q. Went over to your son and daughter-in-law's house?

A. Yes, sir.

Q. About what time would you say you got there?

A. I don't remember exactly, around Seven o'clock.

Q. Did you see your son there?

A. Yes, I did.

Q. Did you say anything to him or did he say anything to you?

A. Yes. I went in and I said 'Dan, what have you done?', and he says 'I haven't done anything', he says 'I want somebody to get some help', and that's all.

Q. That is all he said?

A. That is all he said at this time.

Q. Do you recall writing a statement in . . .

A. I do.

Q. And swearing to it on the 2nd day of August, 1973?

A. I do.

Q. And do you know what you said in that statement?

A. I went back to the house after this, and I was so upset, I couldn't find the phone number, so I called my daughter-in-law, and asked her to call the ambulance.

Q. I'm talking about what you said to your son and he said to you when you went over there about Seven o'clock on the 30th—

A. That's about all that was said there then.

Q. Then you didn't say in this statement—'I went over to Daniel Gardner's and saw what happened and said my God, Danny, what have you done, and he said mom she wouldn't tell me where my babies are and I tried to get her to tell me and she wouldn't so I kept on beating her, she never would tell me where my babies' . . . . . .

A. I was trying to tell you—I went back to the house, and I made this phone call, and I went back over there,—I tried to explain this the other day when you were asking me questions—

Q. You are talking about Mr. Green was asking you questions?

A. Yes.

Q. All right, go ahead.

A. When I went back over there, then is when he was sitting on the couch, and he was crying, and then is when I made this other statement.

Q. What did he say when you went back and he was crying?

A. That is when he said that he guessed he kept on beating her because she wouldn't tell him where the babies were.

Q. Did you see her when you went over there on either occasion?

A. Yes, I did.
Q. Where was she?
A. On the bed.
Q. Would you tell me how she was clothed?
A. She had a sheet over her, over her body—
Q. Did you see any bruises or wounds on her?
A. On her face.
Q. Now, was his half brother over there too?
A. Not at the time.
Q. Were you there at any time when David Merkerson was there?
A. Yes.
Q. Did you hear what he told his half brother that morning?
A. No, I didn't.
MR. OLDHAM: You may inquire.
MR. FITZPATRICK: I have no questions.
WHEREUPON, the witness was excused from the witness stand.
WHEREUPON, the witness DAVID MERKERSON was called by the State and having been sworn, testified as follows:

DIRECT EXAMINATION BY MR. OLDHAM:

Q. Would you state your full name and address to the lady and gentlemen of the jury please?
A. David Merkerson, Rt. 1, Box 35, Homosassa, Florida.
Q. And, you are related to the defendant in this cause, Mr. Merkerson?
A. Yes, I am.
Q. What relation is that?
A. He is my brother,—
Q. Is he a full brother?
A. Half brother.
Q. All right, he is your half brother, is that right?
A. Yes, sir.
Q. Now, on the 29th and 30th day of June, 1973, how far did you live from your half brother, do you recall?
A. About a hundred and fifty foot.

Q. Did you live in a house, or trailer or what?
A. House.
Q. And he lived with his wife and children in a trailer?
A. Yes, sir.
Q. Now, did you have occasion to go to your half brother's house and Bertha Mae Gardner, his wife's house, on the morning of the 30th?
A. Yes, sir.
Q. Did you see your brother?
A. Yes.
Q. Where was he when you saw him?
A. Standing in the door way of the trailer.
Q. Was there anybody else there?
A. Yes, sir.
Q. Who was there?
A. My mother, my wife, Bertha's mother,—Buckshot—he wasn't in the house, he was outside.
Q. Did you say anything to your brother at that time or did he say anything to you?
A. Not at that time, no, sir.
Q. Did you see your sister-in-law in the house?
A. Yes, I did.
Q. Can you describe where she was and what her condition was?
A. She was on the bed, she was dead.
Q. I show you state exhibit number 26 marked for identification and ask if you know what it depicts or shows?
(WITNESS looks at photograph, marked twenty-six, (26) for identification)
WITNESS (continuing)
A. Yes, sir.
Q. What does it depict or show?
A. That's Bertha.
Q. Is that the way she looked when you were there?
A. No, had the sheet over her—and the thing she's laying on was not there, she was on the bed—
Q. There was a sheet half way over her?
A. It was all the way to the neck.
Q. Did you see any bruises or wounds on her face?
A. Discoloration, but I couldn't tell.

Q. Did you hear anything in the night over at your half brother's house, the night of the 29th or the early morning of the 30th?

A. Yes, sir.

Q. What did you hear?

A. Just his voice talking, is all I heard.

Q. Did you hear any noises of any kind?

A. No, sir, I didn't.

Q. Did you hear her voice?

A. No, sir.

Q. Was his voice loud or not?

A. No, sir.

Q. About what time was that?

A. I can't say for sure on the time. I had already been to bed and woke up.

Q. Did you see the defendant when they put him in the patrol car?

A. Yes, sir.

Q. Did he say anything to you or did you say anything to him?

A. Yes, sir.

Q. What was said?

A. He said 'Dave, I guess I really did it this time', and I said 'yes, I guess you did'.

Q. He said 'Dave, I guess I really did it this time'?

A. Yes, sir.

Q. And you said 'yes you did'?

A. Yes.

Q. That is when they took him off?

A. Yes, it was a few minutes after that they took him.

MR. OLDHAM: You may inquire.

MR. FITZPATRICK: No questions.

WHEREUPON,the witness was excused from the witness stand.

THE COURT: We will take a recess at this time.

WHEREUPON, the jury was escorted to the jury room.

WHEREUPON, the spectators were escorted from the court room.

WHEREUPON, the defendant was escorted to the holding room.

THE COURT: Court will be in recess for ten minutes.

WHEREUPON, court was in session after ten minute recess, Spectators returned to the court room, defendant in court room.

THE COURT: Bring the jury in.

WHEREUPON, the jury was returned to the court room and seated in the jury box.

WHEREUPON, the witness, SUSAN MERKERSON was called by the State and having been sworn, testified as follows:

DIRECT EXAMINATION BY MR. OLDHAM:

Q. State your full name and address, please mam?

A. Susan Merkerson, Homosassa, Florida.

Q. And, are you related to the defendant in this cause?

A. My nephew.

Q. Did you know his former wife, Bertha Mae Gardner?

A. Yes, sir.

Q. How far did you live from where they lived?

A. Less than a half block, across the road.

Q. You lived across the road from them?

A. Yes, sir.

Q. Did you live there on the 29th and 30th of June, 1973?

A. Yes, sir.

Q. Did you have occasion to go over to his and his wife's house on the 30th day of June, 1973? The next morning?

A. No, sir.

Q. Did you hear anything the night of the 29th or early morning of the 30th over at their house? Any noise, or anything?

A. Well, about Eleven thirty I heard some bumping, moving furniture, woke me up.

Q. It woke you up?

A. Yes, it woke me up, Eleven thirty, I had done gone to bed, and it sounded like somebody was moving furniture.

Q. Did it come from his house?

A. Yes, sir.

Q. But you didn't go over there the next morning to see what happened?

A. No, sir.

MR. OLDHAM: No further questions.

MR. FITZPATRICK: No questions.

WHEREUPON, the witness was excused from the witness stand.

WHEREUPON, the witness, WALTER OWEZAREK was called by the State and having been sworn, testified as follows:

DIRECT EXAMINATION BY MR. OLDHAM:

Q. Would you state your full name and address for the lady and gentlemen of the jury?

A. My name is Walter Owezarek, address is Route 1, Maple Avenue, Highland South, Inverness.

Q. What is your profession or occupation?

A. I'm an emergency medical technican.

Q. And were you an emergency medical technican on the morning of the 30th day of June, 1973?

A. Yes, sir.

Q. On that particular day did you have occasion to go to the residence of Daniel Wilber Gardner and Bertha Mae Gardner, his wife?

A. Yes, sir.

Q. Did you know them prior to that time?

A. No, sir.

Q. About what time did you get there?

A. Just a little before Seven o'clock.

Q. Do you know who called you?

A. No, sir.

Q. You arrived there and where was their home located at that time?

A. Old Homosassa, a trailer with an extension, patio of some sort.

Q. O.K. When you arrived there, did you take anyone with you? Or did you go alone?

A. I have a driver, but usually I go first, and while he

can position the ambulance in case we have to carry people out.

Q. When you got there at their home, do you recall who was there?

A. There were two females and Mr. Gardner sitting on a couch right as I went to the door.

Q. I show you State exhibit number Twenty-Six (26) marked for identification, and ask if you know what it depicts or shows?

(Witness looks at photograph)

WITNESS (continuing)

A. Yes, sir. This I didn't see immediately, this was much later, it was in another room.

Q. So you stayed in the front room with these people first, is that right?

A. No, well, I asked who was the patient because one of the women's face was all battered up, so I didn't know if that was the patient that we was summoned for, and the call originally was for an unconscious person that we received, an unconscious person.

Q. But this defendant was there, is that right?

A. Yes, sir.

Q. Did he say anything to you when you got there?

A. No—I asked where was the patient and he pointed to the room just opposite, which would have been to the left.

Q. Did you go in that room?

A. Yes, sir, I did.

Q. Did anybody go with you, or did you go alone?

A. I went alone.

Q. What did you see when you got in there?

A. I seen this woman was covered up lying on the bed and I examined her and found no vital signs.

Q. By vital, do you mean signs of life?

A. Yes, sir. There was no vital signs, and her face was battered a little, and then it dawned on me that maybe there was a fight, because a lot of her hair seemed to be missing . . .

MR. FITZPATRICK: We object to the statement made voluntarily by the witness and move the court to stirke.

THE COURT: Objection sustained, motion granted.

MR. OLDHAM (continuing)

Q. Did you uncover her and look at the rest of her body?

A. Yes, sir, I did.

Q. And what did you observe on the rest of her body?

A. That the lower part of her, the pelvic area was a gigantic hematosa, badly beaten. .

Q. You are talking about this area down in here?

A. Yes, sir.

Q. Does she look there (referring to photograph) the same as she did when you went into the room and saw her that morning?

A. She was covered, I had to uncover her—due to our training, anything suspicious we are suppose to give much more thorough examination, and that I did.

Q. And did you say anything to the defendant or did he say anything to you after you uncovered her and pulled the sheet off of her?

A. Well, when I seen that she was so badly bruised, I inquired from the defendant how did it happen,

Q. When you were in the room with Bertha Mae Gardner, deceased, did you ask the defendant anything or did he ask you anything as to what had happened?

A. Well, yes, I did, I asked—well it was my thought there had been a fight, it looked like it from the condition of the house . . .

MR. FITZPATRICK: We object to voluntary statements and conclusions on the part of this witness and move to strike it and ask the court to instruct the jury to disregard it.

THE COURT: Objection sustained, motion granted, the jury is instructed to disregard the Witness's statement about what he thought.

MR. OLDHAM (continuing)

Q. Just tell what the witness said, what the defendant said, not what anybody thought.

A. I asked Mr. Gardner if Mrs. Gardner wore a wig, and he stated that she didn't. I asked him what happened to the hair on her head, because the hair looked to me that it was all pulled out, and there was hair all over, and then I really started to look and there was clumps of hair all

over the place, and that's when my driver came in and I told him to notify the Sheriff's Department.

Q. Did you ask the defendant anything else after about the hair?

A. No, sir.

Q. Did you ask him what happened?

A. No, sir, I didn't.

Q. So, you made no inquiry to him as to what had happened?

MR. FITZPATRICK: We object to the question, it has been asked and answered twice.

THE COURT: Objection sustained.

MR. OLDHAM (continuing)

Q. Now, were you there when the law enforcement officers arrived?

A. Yes, sir, I was.

Q. And, who arrived if you know?

A. Officer Lloyd arrived first, and then Herb came and then Mr. Green.

Q. Would you state their full names?

A. I don't know full name, Lloyd from the Sheriff's Department was first.

Q. Would that be Lloyd Shelton?

A. Yes, sir.

Q. And who was next?

A. Then Herb, Deputy, came . . .

Q. And then who?

A. Then Mr. Green came.

Q. This Mr. Green here?

A. Yes, sir.

Q. Did you move or touch anything from the time you got there to the time Mr. Shelton got there?

A. Just uncover of the victim.

Q. You just uncovered the victim?

A. To examine, yes.

Q. Now, what did you do with the body of the victim? Did you leave it there?

A. When the policeman gave us permission we removed it to the hospital.

Q. What hospital did you take it to?

A. Citrus Memorial Hospital.
Q. Did you leave it there?
A. Yes, sir.
Q. You didn't take it anywhere from there?
A. No, sir.
MR. OLDHAM: You may inquire.
MR. FITZPATRICK: I have no questions.
WHEREUPON, the witness was excused from the witness stand.
WHEREUPON, the witness, LLOYD SHELTON was called by the State and having been sworn, testified as follows:

DIRECT EXAMINATION BY MR. OLDHAM:

Q. Would you state your full name, please?
A. Lloyd Shelton.
Q. And what is your address?
A. P.O. Box 554, Homosassa Springs.
Q. What is your profession or occupation?
A. Deputy Sheriff, Citrus County.
Q. How long have you been a deputy sheriff?
A. Eight and a half years.
Q. Deputy Shelton, did you have occasion to go to the residence of Daniel Wilber Gardner on the 30th day of June, 1973?
A. Yes, sir, I did.
Q. Is it located in Citrus County?
A. Yes, it is.
Q. About what time did you arrive there?
A. Four minutes after Seven, in the A.M.
Q. Did anyone—how did you get there, were you called, or what?
A. I received a call from the Sheriff's Department.
Q. And when you arrived there, do you recall who was there, Lloyd?
A. There was two ambulance drivers and a man and a woman.
Q. Was the defendant there?
A. Yes, sir, he and his mother were sitting inside.

Q. Now, had you known him before this time?
A. Yes, sir.
Q. Did you know his wife before this time?
A. Yes, sir.
Q. And what was her name?
A. Bertha Mae.
Q. O.K. So you knew him and you knew his wife, is that correct?
A. Yes, sir.
Q. Did you know where they lived prior to this time?
A. Not exactly, the house they lived in, I knew the general area, but not the exact house.
Q. When you got there, tell the lady and gentlemen exactly what you observed?
A. When I arrived at the scene, there was two ambulance drivers and a man standing out in the yard, and the ambulance driver led me in the house, and I saw this body lying on the bed, with the feet toward the door where I walked in the house. The body was nude and had been beaten and bruised. To me there wasn't any sign of life in the body. I got ahold of the leg just below the knee and she was cold. And then, I went back to radio the Sheriff's office and had them send Deputy Williams and had them call Mr. Green down to the scene, and while they was on their way down there, I went ahead with some of the investigation, making pictures and talking to some witnesses.
Q. I show you States exhibits number fourteen (14), fifteen (15), sixteen (16), seventeen (17), eighteen (18), nineteen (19), twenty (20), twenty-one (21), twenty-two (22), twenty-three (23), twenty-four (24), twenty-five (25), twenty-six (26), and twenty-seven (27), and ask you if you have ever seen those before, Deputy?
(Witness looks at photographs)
WITNESS (continuing)
A. Yes, sir, I have.
Q. Did you make these photographs?
A. Yes, sir, I did.
Q. And when and where did you make them?
A. I made them at Daniel Gardner's house on June 30th in the A.M.

Q. And, do they depict the inside of the house as it was when you first went in there and observed the inside of the house?

A. Yes, sir, it is just like I saw it when I first went in and took these pictures.

Q. O.K. I show you exhibit number twenty-three (23) marked for identification and ask you what it depicts or shows?

(Witness looks at photograph)

WITNESS (continuing)

A. That is the house and mobile home they lived in.

Q. When you say 'they' who are you talking about?

A. Wilber Gardner and his wife.

Q. You took this picture that morning?

A. Yes, sir, I did.

MR. OLDHAM: Your Honor, I would like to offer into evidence State Exhibit number 23 marked for identification as State exhibit number 1 in evidence.

THE COURT: Any objection?

(Mr. Fitzpatrick looks at photograph)

MR. FITZPATRICK: No objection.

(Marked as State Exhibit 1, Evidence)

MR. OLDHAM (continuing)

Q. State exhibit number 1 has been introduced into evidence, now, what does it show?

A. It shows a house and mobile home, mobile home is a cabana type built to the mobile home, this is the front where you go in the door here.

Q. I would now show you state exhibit number twenty-five (25) marked for identification and ask you also made that photograph?

(Witness looks at photograph)

WITNESS (continuing)

A. Yes, sir, I did.

Q. When did you make it?

A. I made it the same morning.

Q. Same time and place?

A. Same, almost within a . . .

Q. And where was this made?

A. That was the bathroom of the trailer part of the house.

Q. In the trailer part?

A. Yes.

Q. What does this depict or show?

A. Picture shows a bath tub and hair and blood.

Q. Is it the same now as when you originally saw it that morning?

A. Just like when I took the picture.

MR. OLDHAM: Your Honor, I would offer into evidence State Exhibit number twnety-five (25) marked for identification.

MR. FITZPATRICK: No objection.

(Marked as State Exhibit 2, Evidence)

MR. OLDHAM (continuing)

Q. Mr. Shelton, could you stand up here and draw me a diagram of that trailer where the rooms are so I can better understand where everyone was, where the photographs were taken?

(Witness draws)

WITNESS (continuing)

A. This is the cabana, this is the front door—when you go in here, this is one big room in here, this is the door going into bedroom, this is where the victim was lying—

Q. Put 'A' here, this is the front of the house?

A. This is the front of the house—

Q. Put a 'V' in the room where you found the victim—

(Witness marks 'A' and 'V' on drawing)

MR. OLDHAM (continuing)

Q. And where is the bath room?

A. The bath room is in this hall way, here.

Q. What is in this room here?

A. There is a bed here—

Q. Was the victim on a bed in that room?

A. Yes, sir.

(WITNESS returns to the witness stand)

MR. OLDHAM (continuing)

Q. I show you State Exhibit marked number nineteen (19) for identification and ask you if you know what it depicts or shows?

(Witness looks at photograph)

WITNESS (continuing)

A. That is the commode in the bath room and hair in the commode.

Q. Did you make this photograph at the same time you made the others that you testified to?

A. Yes, I did.

MR. OLDHAM: Your Honor, we would offer in evidence State Exhibit Number nineteen (19) marked for identification.

Will be State Exhibit 3.

THE COURT: Any objections?

MR. FITZPATRICK: No objections.

(Marked as State Exhibit 3, evidence)

MR. OLDHAM (continuing)

Q. So, this is the commode that you pointed out here, is that right? (Referring to drawing)

A. I'm not a very good artist, but the bath tub was right beside—

Q. So the bath tub and the commode are both together?

A. Right side by side.

Q. O.K. I show you State exhibit number eighteen marked for identification and ask you if you know what it depicts or shows?

(Witness looks at photograph)

WITNESS (continuing)

Q. Yes, sir, that is the foot of the bed with the victim's feet and bloody sheet, at the foot of the bed.

Q. And what did you do with the sheets and so forth at the foot of the bed?

A. I picked them up and brought them to Inverness to be sent to the lab.

Q. Was this photograph made at the same time as the others you testified to?

A. Yes, sir.

MR. OLDHAM: We would like to offer in evidence state exhibit number eighteen marked for identification, your Honor.

MR. FITZPATRICK: No objection.

(Marked as State Exhibit 4, Evidence)

MR. OLDHAM (continuing)

Q. I show you State exhibit number Four (4) that has been marked and introduced in evidence—is that where you found the garments at the end?

A. Yes, sir, just like that, I never touched them—

Q. This was the feet of the deceased down here (indicates)?

A. Yes, sir.

Q. I would not show you State exhibit number 16 marked for identification and ask if you know what that depicts or shows?

(Witness looks at photograph)

WITNESS (continuing)

Q. Yes, sir, that is going from this living room into this bedroom, this is the door facing, had blood spots on the wall.

MR. FITZPATRICK: To which the defendant objects, this deputy sheriff is not a qualified expert as to whether the spots would be blood or strawberry jam.

MR. OLDHAM: To what I would say, your Honor, he could give his opinion.

MR. FITZPATRICK: Not unless he is a qualified expert, your Honor.

He is not a chemist.

THE COURT: Objection sustained.

MR. OLDHAM (continuing)

Q. Did you make any photographs of that area going into the bedroom?

A. Yes, sir, I got three photo shots of that, same thing there, all three of those were the same. I marked them, put the case number and the date.

MR. OLDHAM: Your Honor, we would like to offer into evidence—were these taken at the same time?

WITNESS: Yes, sir, they were.

MR. OLDHAM: . . . State Exhibit Sixteen (16), Seventeen (17) and Twenty (20) marked for identification.

MR. FITZPATRICK: Your Honor, we are going to object to the pictures, they don't depict a thing, as a matter of fact, I can't even figure out what they are . . . . they

have no relevancy to any issue in this cause, they are just merely pictures.

THE COURT: Objection sustained.

MR. OLDHAM (continuing)

Q. I show you State Exhibit number twenty-seven (27) marked for identification and ask if you know what it depicts or shows?

(Witness looks at photograph)

WITNESS (continuing)

A. Yes, sir, I was standing in the bed room where the victim was lying, and was shooting back toward the other bedroom—I was standing here, taking the picture in this direction—(indicates on drawing).

Q. And what does it depict or show if anything?

A. It shows hunks of hair lying on the floor and a gallon jug.

Q. Is it the same as it was when you took that picture on the 30th day of June 1973?

A. Yes, sir.

MR. OLDHAM: Like to offer into evidence State Exhibit number twenty-seven (27) marked for identification, your Honor.

MR. FITZPATRICK: No objection.

(Marked as State Exhibit 5, evidence)

MR. OLDHAM (continuing)

Q. Would you point out in State Exhibit Number 5 in evidence where the hair was?

A. The hair was lying on the floor, just as you entered, lying right on the floor, right there, (indicates on photograph)

Q. Where is it on this picture, officer?

A. Right here (indicates), dark spot at the bottom . . .

Q. I show you State exhibit number fourteen (14) marked for identification and ask you if you know what it depicts or shows?

(Witness looks at photograph)

WITNESS (continuing)

A. Yes, sir, that is a picture of Glenda Mae Denmey, the deceased's mother.

Q. Did you take that picture at that time?

A. Yes, sir, I did.

Q. Did she look that particular way when you took the picture?

A. Yes, sir, she did.

MR. OLDHAM: I would like to offer into evidence State Exhibit number fourteen (14) marked for identification.

MR. FITZPATRICK: To which the defendant objects, it is a picture of the deceased's mother, not relevant to any issues in this cause, certainly the way she looks has no bearing on the death of Bertha . . . it proves what she looks like but whether or not he hit her—it is imflamatory, and not relevent to the issues in the cause, as between Gardner and his wife.

MR. OLDHAM: Your Honor, I believe it is material due to the fact that it shows the general modusoperandi and conduct of the defendant at the time of the commission of the alleged offense, and there has been testimony prior to this time that he did attack the mother of this deceased, and based upon that I think it is relevent to show what her condition was the next day from the testimony of two witnesses already.

MR. FITZPATRICK: Your Honor, we didn't object to the testimony but a photograph is a different situation. The testimony might be relevent but certainly that photograph isn't.

THE COURT: Objection sustained.

MR. OLDHAM (continuing)

Q. I show you State exhibit number 26 (twenty-six) marked for identification and ask you if you know what it depicts or shows?

(Witness looks at photograph)

WITNESS (continuing)

A. Yes, sir, that is a picture of the victim.

Q. And, is that the way the victim was when you got there?

A. That is just the way the victim was lying whenever I got there.

Q. Was anyone else present when you made the photograph?

A. Not in this room, the two ambulance and myself

walked in, and I looked the situation over and went back and got my camera and asked them to move back out while I was making the pictures.

MR. OLDHAM: Your Honor, at this time we would offer into evidence State Exhibit number 26 marked for identification.

MR. FITZPATRICK: Can I ask a couple questions?

QUESTIONS BY MR. FITZPATRICK:

Q. Mr. Shelton, that picture depicts a body, did you know Bertha before this occurred?

A. Yes, sir, I have seen her off and on for about two years.

Q. What would you say this is (indicates photograph)

A. What?

Q. That thing right there?

A. That lifter?

Q. What is it?

A. The ambulance drivers put that there to lift her up.

MR. FITZPATRICK: We object to the introduction of the photograph in evidence, sir, it is obvious from the photograph that that body is not in the same position it was at the time of the alleged crime.

MR. OLDHAM: To that I would say, your Honor, that the Supreme Court decided that issue in Wesley vs. State, 244 Southern Second 418.

THE COURT: Objection overruled.

(State Exhibit twenty-six (26) identification marked as State exhibit 6 evidence)

MR. OLDHAM (continuing)

Q. State Exhibit Number 6 is the picture of the victim as you saw her?

A. Yes, sir.

Q. When you saw her, did you notice any bruises or wounds or anything like that?

A. Yes, sir, she was bruised from her feet all the way, and more bruised so in between the legs.

Q. Did you notice anything about her head, officer?

A. Yes, sir, her hair had been pulled out.

MR. FITZPATRICK: To which the defendant objects, calls for a conclusion on the part of the deputy. He can testify her hair was missing, certainly not that it was pulled out.

WITNESS: Approximately one-third of her hair was missing in the front

MR. FITZPATRICK: Move to strike that portion of the testimony from the record.

THE COURT: Motion granted.

MR. OLDHAM (continuing)

Q. I show you State Exhibit number thirty (30) marked for identification and ask you if you have ever seen it before, officer?

(Witness looks at exhibit)

WITNESS (continuing)

A. Yes, sir, I have.

Q. Where did you first see it and when?

A. It Dan Gardner's house, it was lying on the floor by the couch.

Q. What room are you talking about now, officer?

A. The couch was here (indicates on drawing) by the front door.

MR. FITZPATRICK: Did he mark the placement of the bottle?

MR. OLDHAM: Mark a 'B' where you found the bottle.

(Witness marks 'B' on drawing)

MR. OLDHAM (continuing)

Q. And, State exhibit number 30 marked for identification, what did you do with it after you saw it there, officer?

A. I picked the bottle up and brought it to the jail, sent it to the lab.

Q. Who did you turn it over to?

A. I turned it over to Deputy George Hanstein.

Q. And you turned the other evidence over to Deputy Hanstein?

A. I turned all I had over to Deputy Hanstein.

Q. So, all the evidence, tangible evidence that you are testifying to that comes up here, you turned it all over to him at the jail?

A. Yes, sir. I did.

Q. And what date and time did you turn it over to him?
A. I turned it over to him on the 30th day of June, in the A.M.
Q. Is this bottle the same now as you saw it in the early morning on the 30th day of June, 1973 at the defendant's home?
A. Yes, sir, the stopper was off of it, it was lying on the floor across from—I put the date, criminal report number and initialed it.
Q. That is your initial?
A. Yes.
MR. FITZPATRICK: Did you offer that in evidence?
MR. OLDHAM: No—
MR. OLDHAM (continuing)
Q. I show you State Exhibit number twenty-eight (28) marked for identification and ask if you have ever seen it before, officer?
(Witness looks at exhibit)
WITNESS (continuing)
A. Yes, sir, I did.
Q. And when is the first time you ever saw it?
A. That morning, I got it off the couch where he was sitting.
Q. When you say 'he', who is that?
A. Dan Gardner.
Q. That fellow over there (indicates defendant)
A. Yes, sir.
Q. And it was on the couch, was it on anybody?
A. No, sir, just lying on the couch.
Q. And what did you do with State Exhibit number twenty-eight that has been marked for identification?
A. Put in plastic bag, put tag and everything on it and turned it over to Deputy George Hanstein.
Q. For what purpose?
A. To send it to the lab.
Q. I show you State exhibit number thirty-one (31) marked for identification and ask if you have ever seen it before, officer?
(Witness looks at exhibit)
WITNESS (continuing)

A. Yes, sir, I have.
Q. When is the first time you saw it and where did you see it?
A. Saw it June 30th, 1973, in Dan Gardner's house.
Q. What is it?
A. It's clothes believing to be the victim's.
MR. FITZPATRICK: Move to strike the voluntary remarks by the witness, and ask the jury be instructed to disregard it.
THE COURT: Objection sustained, motion granted, the jury is instructed the statement of this witness as to he believed to be the clothes of the victim.
MR. OLDHAM (continuing)
Q. Where did you find this exhibit, officer?
A. Do you want me to show you (refers to drawing)?
Q. Yes.
A. It was in the corner of the cabana part of the house, it was in this corner (indicates on drawing) and other sheets and clothes on top of it.
Q. What did you do with State Exhibit number thirty-one that has been marked for identification?
A. I picked it up, marked it, initialed it and brought it in and turned it over to Deputy George Hanstein to go to the lab.
Q. Did you initial anything, officer?
A. Yes, sir, I did—I initialed the bag and all those pieces in there.
Q. I show you State Exhibit marked number twenty-nine for identification and ask if you have seen this before?
(Witness looks at exhibit)
WITNESS (continuing)
A. Yes, sir, I have.
Q. When is the first time you saw it?
A. They was in Dan Gardner's house.
Q. Where?
A. One was one place and one another . . . One of them was, I don't know exactly, but he didn't have them on, he picked them up and put them on after I arrested him and brought him to jail, I took them off of him and held them for evidence.

Q. Are they the same now as they were when you picked them up there at his house?

A. Yes, sir, I tied them together and tagged them and put each shoe in a separate bag, and turned them over to Deputy George Hanstein to go to the lab.

Q. I show you State exhibit number thirty-two marked for identification, officer, and ask you if you have ever seen this before, sir?

(Witness looks at exhibit)

WITNESS (continuing)

A. Yes, sir, I have.

Q. What is it, if you know?

A. It's sheets and pillow case, wash cloth.

Q. Where did you first see this item?

A. They was in different spots—two sheets were at the foot of the bed, the other sheet was in this corner of the living room.

Q. What did you do with these articles?

A. I dated them, put the case number on them, initialed them, brought them to the jail and turned them over to Deputy George Hanstein.

Q. I show you State's Exhibit number 34 thirty four, and composite exhibit number thirty-three (33) and ask if you have ever seen those before?

(Witness looks at exhibit)

WITNESS (continuing)

A. No, sir, I don't recognize that.

Q. You don't recognize State Exhibit number thirty-four—is that right?

A. No, I don't. Number thirty-three (33) is hair samples taken out of the house of Wilber Gardner's . . .

Q. Where did you find this particular hair sample?

A. In the living room.

Q. This came from the living room?

A. This came from the living room, and this is hair samples and it came out of the bed room—

Q. Which bedroom are you talking about, officer?

A. I can't see if that's the room she was in, or the room next to the room she was in . . . I believe this is the hair samples out of the room next to the room she was in.

Q. Then you picked these hair samples up from around the house, is that right?

A. Yes, sir, I did.

Q. What did you do with State Exhibit Number 33 marked for identification?

A. I brought it over and turned it over to Deputy George Hanstein—sent it to the lab.

Q. I show you State Exhibit number thirty-five marked for identification, and ask if you know what it depicts or shows?

(Witness looks at exhibit)

WITNESS (continuing)

A. Yes, sir, I scrapped some substance off of his fingernails.

Q. Well, now, who is 'he'?

A. Wilber Gardner. Dan Gardner. The defendant, over there.

Q. You say you scrapped some things off his fingernails?

A. Yes, sir, from around his fingernails and under his fingernails.

Q. Where and when did you do that?

A. I did that at the jail and turned it over to Deputy George Hanstein.

Q. And what date and time did you take the fingernail scrappings from him?

A. This was the same day that I brought him over to the jail, in the morning.

Q. That would have been the 30th day of . . .

A. 30th day of June, 1973.

MR. FITZPATRICK: Did he state what time it was?

WITNESS: It was in the A.M., it was after we got over to the jail, I don't remember the exact time.

MR. OLDHAM (continuing)

Q. Now, did you have occasion to go to go to Leesburg General Hospital on or about that period of time?

A. No, sir, I didn't.

Q. Is this house that he and his wife were living in located in Citrus County?

A. Yes, sir it is.

Q. Now, did you advise this defendant of anything once you got their, officer?

A. Not immediately, when I got there, I did a little investigation to find out who had committed the crime, so I arrested Wilber Gardner and advised him of his rights.

MR. FITZPATRICK: Excuse me, Mr. Oldham—your Honor, we object to technicalities, this witness is still making voluntary statements, making investigation to see who committed a crime—it hasn't been established yet that there has been a crime committed. Move the court to instruct the jury to disregard it and also strike it from the record. That is what we are here for.

THE COURT: Motion granted, jury instructed to disregard that portion of the witness statement objected to by the defendant's attorney.

MR. OLDHAM (continuing)

Q. When you got there, officer, did you question the defendant at any time?

A. No, sir.

Q. Did you advise this defendant of his constitutional rights?

A. Not when I first got there.

Q. I didn't ask you that, I said 'did you'?

A. Yes, sir.

Q. When did you advise him of his constitutional rights?

A. When I arrested him.

Q. How long had you been there before you arrested him, officer?

A. Approximately, I would say approximately thirty, thirty-five minutes.

Q. And will you tell the ladies and gentlemen of the jury exactly what you advised him of?

A. I advised him he didn't have to say anything, that anything he said could and would be used against him in a court of law, and if he didn't have money for an attorney, the state would afford him one at no cost to him, and asked him if he understood his rights, and he said that he did.

Q. So, you gave him what was known as the Miranda warnings, is that right?

A. Yes, sir.

Q. All right, after you had given him that warning, did he make any statement to you, officer?

A. No, sir, I started to put the handcuffs on him, and he said 'you don't have to do that', and I said 'well, it's a very serious crime, and I will have to put the handcuffs on you', and then I took him out to the car.

Q. Did he make any statement to you after you had taken him to the car on the way back to Inverness?

A. Yes, sir, we are driving along, on along about the Sugar Mill Tavern, we wasn't having any discussion, just driving along, and he made the statement to me about his wife had been running around with other people, and said she had been out with his brother, and he said 'that thing has been eating on me', he said 'it was just more than I could stand'.

Q. That's all he said?

A. I probably got a little bit ahead of myself—first he said 'why would a man do something like that',—'why did I do something like that', and I said 'why did you'? and that is when he told me what he did.

Q. Let's go back over that again—he said 'why would a man do something like that'—what was he referring to?

A. About the death of his wife.

MR. FITZPATRICK: We again move the court to instruct the witness to stop making voluntary statements—move to strike it from the record and ask the jury to disregard it. He doesn't know what he was referring to.

THE COURT: Motion granted, the jury is instructed to disregard that portion of the witness' statement objected to by the defendant's attorney.

MR. OLDHAM: No further questions of this witness at this time.

CROSS EXAMINATION BY MR. FITZPATRICK:

Q. Deputy Shelton, you have testified here today as to what you saw at the home of Dan Gardner is that correct?

A. Yes, sir.

Q. You don't have any knowledge of what happened at

that house that morning or the night before or early in the morning, or ten minutes before you got there, do you?

A. No, sir, I don't.

Q. You don't have any knowledge as to why was involved in this alleged attack on this woman, or anything else, do you?

A. Don't have any knowledge?

Q. Only, you are only testifying to what you found at the scene, isn't that correct?

A. Yes.

Q. You don't know anything else about it, do you?

A. No.

Q. You don't know who the clothes belonged to, you don't know what those things the State Attorney just showed you, you don't know where they come from or who they belonged to, do you?

A. No, sir, I don't.

Q. They could have belonged to anybody, is that correct?

A. That's correct.

Q. You are not trying to tell this jury that any of those articles there belonged to any body, I mean, belonged to Dan Gardner?

A. No, sir.

MR. FITZPATRICK: Thank you.

RE-DIRECT EXAMINATION BY MR. OLDHAM:

Q. Mr. Fitzpatrick asked you, you didn't know what happened there—I would ask you if this defendant did not give you a signed statement on the 30th day of June 1973 concerning what happened that night?

A. Yes, sir, he did.

Q. And was it in writing?

A. Yes, sir. He gave us a statement, the secretary over there took it down, typed it out, and he read it and then signed it.

Q. Had he been advised of his rights under the Miranda at the time he gave the statement?

A. Yes, sir, he did, when I got him in there and asked did he want to give a statement, and he said he did, and I

advised him at that time that he didn't have to do it, he could do it voluntarily, and he did.

Q. What did he tell you in that statement?

A. I can't remember, I've got a copy of it. Do you want me to read it?

Q. Just tell basically what he told you in that statement he gave you.

A. He just told me that he and his wife had got into a fuss, after they had got home and he beat her and then she got up and went and took a bath, got back in the bed and he beat her some more, and then he said he went to sleep and he didn't wake up until the next morning.

MR. OLDHAM: No further questions.

MR. FITZPATRICK: No further questions.

WHEREUPON the witness was excused.

WHEREUPON, the witness, DAVID CHANCEY was called by the State and having been sworn, testified as follows:

DIRECT EXAMINATION BY MR. OLDHAM:

Q. Would you state your full name and address for the lady and gentlemen of the jury, please sir?

A. My full name is David Reid Chancey, R-e-i-d, my Address is Star Route 2, Dunnellon, Box 306Y, Dunnellon.

Q. Mr. Chancey did you have occasion on the 30th day of June, 1973, to go to the home of Daniel Wilber Gardner and his wife, Bertha Mae Gardner?

A. No, sir.

Q. Did you have occasion to—let me show you this—I show you state exhibit number six (6) in evidence and ask you if you have ever seen that body before?

(Witness looks at exhibit)

WITNESS (continuing)

A. Yes, sir.

Q. Where did you first see it?

A. At Citrus Memorial Hospital.

Q. And what did you do with the body if anything?

A. I took the body from Citrus Memorial to Leesburg General.

Q. And, when was that?

MR. FITZPATRICK: Excuse me, Mr. Chancey—this gentlemen seems to have some notes in front of him that he is reading from.

WITNESS (continuing)

A. This is an ambulance service sheet—

MR. FITZPATRICK: Q. I would like to know when it was made, was it made yesterday?—When were those notes made that you are reading from?

WITNESS: This sheet was made on Six-thirty—

MR. FITZPATRICK: That evening?

WITNESS: We make it on each run, at the time we make the run.

MR. FITZPATRICK: When you got through taking the body over there, then you made the report?

WITNESS: We put the name on, . . .

MR. FITZPATRICK: Did you make it on June 30th?

WITNESS: Yes, sir.

MR. FITZPATRICK: Withdraw the objection.

MR. OLDHAM (continuing)

Q. So, you took the body to the Leesburg Hospital, is that right?

A. Yes, sir.

Q. Did you leave the body here?

A. Yes, sir.

Q. Did you go get the body later?

A. No, sir.

Q. Did anybody go with you when you took the body over there?

A. No, sir. It has on here the time we left the hospital, time we arrived destination . . . .

Q. Well, how about telling us what time you left the hospital?

A. I left the hospital, dispatch time was Nine-ten A.M., the arrival time was Nine-fifty-five A.M., returned to hospital at Eleven A.M.

Q. And this is the body you took (referring to exhibit)

A. Yes.

MR. OLDHAM: No further questions of this witness, Your Honor.

CROSS EXAMINATION BY MR. FITZPATRICK:

Q. You don't know who that is in that picture, do you? You only know what somebody told you?

A. Other than what I have on here, what the name . . . . .

MR. FITZPATRICK: No further questions.

MR. OLDHAM: No further questions, your Honor.

WHEREUPON, the witness was excused from Court.

THE COURT: Members of the jury, it is a little after Five o'clock, we are going to take a recess very shortly. I want to admonish all of you again not to discuss the case among yourselves or with anyone else for form or express any opinion about the merits of the case. I cannot emphasis too strongly that you should not discuss the case with anyone, even your wives, or friends or anyone. If anyone does attempt to talk to you about the case, notify me when you return in the morning promptly because it would be an act of contempt of court and to be punished as such. Now I am going to ask that when you come back tomorrow you bring overnight sleeping garments, toothbrush, it may be necessary for this case to be continued over to the next day and if it is, then we will have to keep you together. We will make arrangements for you to stay at one of the local motels and you will be given your meals and your motel accomodations. I will ask that you be back in the jury room at Nine thirty in the morning. Please escort the jury out.

WHEREUPON, the jury was escorted from the court room.

WHEREUPON, the defendant was escorted to the holding room.

THE COURT: Court will be in recess until Nine-thirty in the morning.

WHEREUPON, court was in session, January 9, 1974, Ten Twenty A.M. Defendant brought into court room, seated at defense table.

(AT THE BENCH):

MR. KOVACK: Your Honor, we move that this matter be mistried, make a motion for mistrial on the basis of Furr vs. State, 229 Southern Second 269, in that the State used a

relative of the deceased to identify the body, and the last witness put on last night was Deputy Shelton who could have identified the body. They did not have to use a relative, the mother of the victim, and the State has committed error, and we move for a mistrial.

MR. GREEN: In support of our motion to deny the request we feel the record supports our position, there was genuine and real purpose for placing the mother on the stand. She testified to facts not known by Deputy Shelton, as to certain statements made to the mother by the defendant.

THE COURT: Motion is denied.

MR. KOVACK: The second motion for mistrial, your Honor, the Tampa Tribune dated January 9, 1974, in which the headlines read 'Mother Weeps Over Victim's Photo'—as I got out of my automobile this morning, in front of the Sheriff's office, I was approached by one of the jurors who made mention it was foggy this morning, and he stated he thought the jury was to return at Nine-thirty this morning but the paper indicated Nine A.M. As I recall, I believe his name is Segal. I had no further conversation with him other than what I have stated in the record. Based on this, I move for a mistrial.

MR. GREEN: We do not know for a fact this juror read the paper, it is nothing than a mere suspicion at this time.

THE COURT: Have you had a chance to read the article?

MR. OLDHAM: I have glanced through it, your Honor, and I see nothing in the article that was not reflected verbatem by the witnesses.

THE COURT: I find nothing in the article that was not brought out in the testimony, nothing there other than just statements of the witnesses.

MR. KOVACK: We feel the two together would be prejudicial error.

THE COURT: The attorneys are under the instruction not to talk with the jurors and I point out that you yourself could place yourself in jeporady [sic] by talking with him. I have specifically told, announced several times in all proceedings that the attorneys are not to talk to or associate with the jurors. Motion is denied.

WHEREUPON, discussion ended at the bench.

WHEREUPON, the jury was escorted from the jury room to the court room and seated in the jury box.

WHEREUPON, DOCTOR WILLIAM H. SHUTZE was called by the State and having been sworn, testified as follows:

DIRECT EXAMINATION BY MR. OLDHAM:

Q. Would you state your full name and your address for the lady and gentleman of the jury, please?

A. I'm William H. Shutze, I'm a pathologist in Leesburg.

MR. OLDHAM: Your Honor, I would submit that this is an expert witness within the meaning of the law of the State of Florida,

MR. FITZPATRICK: No objection.

MR. OLDHAM (continuing):

Q. I show you State Exhibit number 6 that has been admitted to evidence and ask you whether or not you have ever seen that particular person before?

(Witness looks at photograph)

WITNESS (continuing)

A. Yes.

Q. And when did you see her, Doctor?

A. It was on the 7-2-73 at the Leesburg General Hospital in the morgue.

Q. That would have been July 2nd?

A. Yes.

Q. And did you ascertain what her name was?

A. Yes.

Q. What was her name?

A. Bertha Mae Gardner.

MR. FITZPATRICK: To which the defendant objects, proper predicate has not been laid, move to strike.

MR. OLDHAM: To that I would say, your Honor, he has identified the body of the deceased, he states that he has ascertained the name, so I think it is proper for him to divuldge the name of the person involved.

MR. FITZPATRICK: There is no ascertaining there, sir. He is just saying that is the deceased we are talking

about—he doesn't know that is the deceased. Proper question is whether he knows that is her or not, not whether he has ascertained it by some hearsay—

THE COURT: Approach the bench.

(Whereupon, there was discussion at the bench, Mr. Fitzpatrick, Mr. Oldham; whereupon discussion at the bench ended:)

MR. OLDHAM (continuing)

Q. How did you ascertain the name?

A. The name of the individual was on a name tag on the body.

Q. And from the name tag and the identification of the photograph, that was the body you performed the autopsy on?

A. Yes, sir.

Q. Who was present when you performed this autopsy?

A. Bob Teese, the photographer.

Q. Did he take pictures at the time you were performing this autopsy?

A. Yes, he did.

Q. How long did it take you to perform this autopsy, Doctor?

A. Took approximately two hours.

Q. Will you tell the ladies and gentlemen of the jury exactly what you observed of this body before you attempted to perform the autopsy, give as much detail as possible?

A. This was a white woman, approximately twenty-six years of age which was unclothed, there were many contusions of the scalp, bruises of the scalp, on both sides and in some of the bruises there were abrasions or scrapes in the center where the skin had been taken off. There were bruises around both eyes, there was a deep cut below the right eye, and down on the brain you could take the scalp forward and it was just a massive hemorrhage into the scalp in this area around this way. There was a contusion on the bridge of the nose. Over the chest there were fifteen or twenty bruises over the breast and sides of the chest, varying from a half inch to an inch in diameter. There were multiple bruises on the abdomen varying from one-half inch to one inch also in diameter. There was a mas. ive hemorrhage

into the pubic area down on the innter[sic] survaces [sic] of the thigh, and the labia of the vulva, the external genitalia of the woman was all swollen and bruised. There was also [a] large abrasion on the inner surface of the left thigh, area approximately one and a half by three inches. On the arms and the legs there were many bruises also varying anywhere from a half inch to three inches in diameter. Same thing over the back. I would estimate in total bruises on the body that there were somewhere in the neighborhood of at least a hundred. On opening the body, the lung and heart were essentially normal, there was some accumulation of fluid inside the lung. The liver showed a large, what we call laceration or tear almost to the entire right side of the liver and there was approximately five hundred cc's of blood in the abdominal cavity. There was hemorrhage in or around the right adrenal gland and the right kidney, lays in the body kind of behind the liver and down a little bit. In the lower portion of the body, the peritoneal cavity, the pubic bone was just broken up into small pieces from blunt injury such as being stomped, or—that is about the only way I could think it could be done. The perineum, on the perineum there is a large laceration extending from the posterior part of the vagina down towards the anus and inside the vagina the large tears all the way from the outside entrance up to the back as far as it could go. The brain showed small areas of hemorrhage under the covering of the brain, there were no hemorrhages in the brain. That's about it.

Q. What about the legs, did you find any bruises?

A. Many—many bruises on the legs.

Q. I see. Could you ascertain, as an expert whether anything was placed in the vagina of the woman?

A. Yes, there had to be, some sort of a round or square, such as a broom stick or a bat or a bottle or something like this.

Q. Doctor, could you estimate with the number of wounds whether they were committed, whether they were there by instrument, first, stomping, rolling on the floor, or what?

A. I think it was probably a combination of all, the abra-

sions on the head, there were so many, I couldn't see how it could be possible to be done by fist, they were so massive. Also I am sure some of the injury occurred from grabbing the hair and pushing the head against either a wall or the floor or what have you, and as a result in the violence of it all he had pulled her hair out, there were patches of bald spots.

Q. Did you blood type this deceased and find out what blood type she was, Doctor?

A. Yes, she was Group B RH positive.

Q. Group B RH positive? . . . I show you State Exhibit number 7 for identification, 6 for identification, 5 for identification, 4 for identification, 1 for identification, 13 for identification, 12 for identification, 11 for identification, 10 for identification, 9 for identification, 3 for identification, 1 for identification, and 8 for identification. I ask you whether or not you were present when these photographs were taken?

(Witness looks at photographs)

WITNESS (continuing)

A. Yes. Yes, I was present.

Q. Do these photographs depict the victim and certain aspects of the autopsy that you performed?

A. Yes, sir.

Q. And you were present at the time?

A. Yes, I was.

Q. And do you know who took those photographs?

A. Mr. Teese, from Leesburg.

Q. I see. Doctor, can you tell this lady and gentlemen in a medical opinion what this woman died from?

A. She died as a result of a combination of loss of blood from the large tear in the liver, which bled in the peritoneal cavity, and from the fracture of the pubic bone, in a fracture of a bone this size you lose a large amount of blood,and also as a result of the trauma to the body which as result the two of them would result in shock and subsequent death.

Q. Doctor, how long would a person live that received a beating such as this?

A. With this much trauma, I would estimate approximately fifteen to twenty minutes.

Q. Doctor, from your autopsy could you tell whether or not all of the bruises occurred at one time or did they occur over an hour or anything of that nature?

A. I am sure they all occurred over a short period of time.

Q. Did you weigh this deceased to determine how much she weighed?

A. No, I estimated.

Q. What was your estimate?

A. Ninety pounds.

Q. Do you recall what date those photographs you saw were taken, doctor?

A. On 7/2, the same day of the autopsy.

Q. Where?

A. At Leesburg General Hospital

Q. Doctor, did you ascertain whether or not the victim would have been unconscious during part of the blows administered to her, or would she have been conscious during the whole time, is there any way you could tell?

A. It is difficult to say exactly, but from the trauma to the head it would not be surprising that she would be unconscious.

Q. When the other possible blows were administered to her?

A. Yes, saying that the blow to the head were first. But if the blows to the head were later on she would have been alert.

Q, If the blows to the rest of the body had come before the blows to the head, then she would have been alive and alert . . .

MR. FITZPATRICK: To which the defendant objects, the state attorney is leading this witness . . .

MR. OLDHAM: I will withdraw the question.

MR. OLDHAM (continuing)

Q. Now, I would like to go back to the hair, Doctor . . . tell me about the condition of the woman's hair?

A. She had patches, large patches of hair that were missing which were not of a disease nature, it was from ac-

tually being pulled out rather than losing it naturally or due to some disease process.

Q. And what about the back of the skull?

A. The bone was in tact, no skull fracture, there was a marked degree of hemorrhage into the scalp, in the back.

MR. OLDHAM: You may inquire.

CROSS EXAMINATION BY MR. FITZPATRICK:

Q. Doctor, last evening, I called some friends of mine, ...

MR. OLDHAM: Your Honor, that hasn't got anything to do with . . .

MR. FITZPATRICK: I will withdraw it.

MR. FITZPATRICK (continuing)

Q. Where is Creighton University, Doctor?

A. Creighton University is in Omaha, Nebraska.

Q. Doctor, when you received this white female, you said twenty-six years old?

A. Twenty-six is the age that was given to me.

Q. Was anybody present when the body was delivered to you?

A. No.

Q. How was the body physically delivered to you?

A. It was transported via the Citrus County Ambulance.

Q. Did you know the ambulance driver?

A. I was not physically present when the body was delivered.

Q. Do you know how the name tag got attached to the body?

A. Yes, the body was delivered to the emergency room of the Leesburg General Hospital, the nurse . . .

Q. Just a minute, doctor,—do you know how that particular tag got attached to that particular body? Were you present when it was done?

A. No.

Q. You don't know how that tag got on there, do you? Of your own personal knowledge?

A. No, it is a matter of assumption.

Q. Doctor, as far as you know, that could have been Billy Jo King, isn't that correct?

A. I have to go by what . . . .

Q. I am not asking you what you have to go by, Doctor. You don't know who the name of that body was, do you?

A. Not really.

Q. And when you testified here today that was Bertha Gardner, you don't really know that was Bertha Gardner, do you?

A. It was Bertha Gardner's name on the body.

Q. I didn't ask you that— you don't know that that was Bertha Gardner, do you?

A. I don't know why it would have another name on it.

Q. You don't know that that was Bertha Gardner, do you, Doctor?

A. To get right down to it, I guess not.

Q. You don't? And when you testified here this morning that you performed an autopsy on Bertha Gardner, you testified from an assumption, didn't you?

A. With the photographs that were taken I'm sure the State Attorney, if this were the wrong body . . .

Q. Doctor, I don't want any voluntary statements— just answer the question.

A. Yes, sir.

MR. FITZPATRICK: We move to strike the entire testimony of the Doctor, it is all a matter of hearsay, there is no identification of the body.

MR. OLDHAM: Your Honor, there has been ample identification, the photograph has been placed in evidence, he has identified the photograph as being the body he performed the autopsy on, and that photographs was identified as being the deceased in this case by the deceased's mother. The mother of the defendant also identified the photograph, and Mr. Shelton.

THE COURT: Escort the jury out, please.

WHEREUPON, the jury was removed from the court room.

THE COURT: What photographs of the victim have been introduced into evidence?

(Mr. Oldham hands photographs to the Court)

THE COURT: This is the photograph that was identified by the victim's mother?

MR. OLDHAM: The mother, and Mr. Shelton, your Honor, and also by Dr. Shutze.

THE COURT: This is exhibit 6—State Exhibit Number 6. And Dr. Shutze has identified the victim from State Exhibit 6?

MR. OLDHAM: Is that correct, Doctor?

DR. SHUTZE: Yes.

THE COURT: I was not certain in my own mind, he identified some photographs that were introduced for identification purposes only, so that I am certain of this, Mrs. Davis, would you verify exhibit number 6 has been identified by Dr. Shutze?

COURT REPORTER: —Question: I show you State Exhibit number 6 that has been admitted to evidence and ask you whether or not you have ever seen that particular person before?—Yes. —And when did you see her, Doctor?—It was on the 7-2-73 at the Leesburg General Hospital in the morgue.—That would have been July 2nd?—Yes.—And did you ascertain what her name was?—Yes. And what was her name?—Bertha Mae Gardner.

THE COURT: Motion denied.

MR. FITZPATRICK: Your Honor, let me ask him out of the presence of the jury about this photograph—Doctor, when was the last time you saw this photograph?

DR. SHUTZE: This morning.

MR. FITZPATRICK: Before that?

DR. SHUTZE: Never seen it before.

MR. FITZPATRICK: You had never seen this before?

DR. SHUTZE: No.

MR. FITZPATRICK: Doctor, how many autopsies have you performed since July 2nd of 1973?

DR. SHUTZE: July 2nd?—approximately sixty.

MR. FITZPATRICK: And you can positively identify that woman as the one you performed the autopsy on on July 2nd?

DR. SHUTZE: Yes.

MR. FITZPATRICK: Nobody has indicated to you who this body was?

DR. SHUTZE: No.

MR. FITZPATRICK: That's all.

MR. FITZPATRICK: We renew the motion.

THE COURT: Motion denied. Bring the jury back in, please.

WHEREUPON, the jury was returned to the court room, seated in the jury box.

MR. FITZPATRICK (continuing)

Q. Doctor, I believe you testified that the multiple contusions and bruises and one thing or another that were on the body were probably placed there in a short period of time?

A. Yes.

Q. Now, what do you define as a short period of time? Thirty minutes, fifteen minutes—

A. Yes—fifteen to thirty minute period.

Q. It wasn't over a period of four or five hours?

A. Oh, no.

Q. Doctor, did you perform any blood alcohol test on this body?

A. Yes, I did.

Q. And what did you find?

A. Was a Hundred and Ninety milligrams percent, .19 grams percent which would indicate mild to moderate intoxication.

Q. Now, you are talking about .19—does that have anything to do with the .10 that would come from a breathalyzer?

MR. OLDHAM: Objection, your Honor, this is improper cross for one thing, and secondly, he is trying to go into a field that this man is not an expert in, it would be the alcohol breathalyzer test, this man is not an expert as to breathalyzer.

THE COURT: Objection sustained as to the second ground.

MR. FITZPATRICK (continuing)

Q. Doctor, what would you term the intoxication with the percent you just mentioned?

A. Legal intoxication is .10.

Q. What would you term her intoxication in terms of slight, heavy, . .

A. Mild to moderate.

Q. Now when you say legal intoxication is .10?

A. Right.

Q. What do you mean by that?

A. Well, this as determined by law to be legally intoxicated while driving.

Q. In other words, if you are .10 you are intoxicated?

A. Correct.

Q. And if you are .19, you are much more intoxicated?

A. Right.

Q. Is that correct?

A. Correct.

MR. FITZPATRICK: Thank you, Doctor.

MR. OLDHAM: I have no further questions.

WHEREUPON, the witness was excused.

WHEREUPON, the witness, CHANDLER SMITH was called by the State and having been sworn, testified as follows:

DIRECT EXAMINATION BY MR. OLDHAM:

Q. Would you state your full name for the ladies and gentlemen of the jury, please sir?

A. My name is Chandler Smith.

Q. What is your address?

A. Sanford, Florida—I live in Deland, work in Sanford.

Q. What is your employment?

A. I work at the Sanford Crime Lab.

Q. And, what are your duties there?

A. I'm a criminalist examiner, I examine material submitted by law enforcement agencies that is relative to capital crimes and more specific than that, the blood, hair, fibers, this type of material, different from drugs, narcotics . . .

Q. What experience and training have you had?

A. I have worked at the crime lab now for about two and a half years, prior to that my education, I have a bachelor of science degree from Stetson University.

Q. Approximately how many samples have you examined during the last two and a half years?

A. Individual exhibits would number in the thousands some where.

Q. Have you ever testified as an expert witness before?

A. Yes, I have.

Q. And what courts have you testified in?

A. In capital cases, murders and rapes, I have testified in Lake County, Orange County, Brevard, Volusia County.

MR. OLDHAM: Your Honor, we submit that this is an expert witness within his field and training and should be allowed to testify as an expert.

MR. FITZPATRICK: No objections.

MR. OLDHAM (continuing)

Q. I show you State Exhibit Number thirty-five marked for identification and ask you to tell us if you have seen it before?

(Witness looks at exhibit)

WITNESS (continuing)

A. Yes, sir, I have.

Q. When did you first see it, sir?

A. This was submitted by Investigator George Hanstein of the Citrus County Sheriff's Department on the 6th of July, 1973, at 10:30 in the morning.

Q. And did you run any examinations on it?

A. Yes, sir. The envelope contained fingernail scrapings, actually pieces of dirt and flesh, it was submitted as fingernail scrapings. It contained human blood mixed with dirt and sand. It was insufficient blood to determine what group it was. But, it was human blood.

Q. And how do you analize [sic] the finger nail scrapings to determine whether or not it is human blood or not?

MR. FITZPATRICK: To which the defendant objects and move to strike the testimony of this witness in connection with the fingernail scrapings inasmuch as he has testified positively that the blood that was contained therein was not identified. Wouldn't have any bearing on this case.

MR. OLDHAM: The blood is not identifiable by type, your Honor.

MR. FITZPATRICK: He said it was blood—so it is blood—

MR. OLDHAM: Further, your Honor, I think the exhibit shows the scrapings came from the defendant in this case.

MR. FITZPATRICK: We've got nothing to argue about there, Judge. But it doesn't have any bearing as to whether or not this murder was committed. He could have cut his finger.

MR. OLDHAM: These were scrapings from under the fingernail, your Honor.

(Discussion at the bench, Mr. Oldham, Mr. Fitzpatrick and the Court; discussion at the bench ended)

THE COURT: Objection overruled.

MR. OLDHAM: At this time, your Honor, we would like to offer into evidence State Exhibit Number 35 marked for identification into Evidence as State Exhibit Number Eight (8).

MR. FITZPATRICK: Defense would object to the introduction on the same grounds as to the testimony of this witness.

THE COURT: Objection overruled.

(State Exhibit thirty-five (35) identification) marked as State Exhibit Eight (8) evidence.)

MR. OLDHAM (continuing)

Q. I show you State Exhibit twenty-eight (28) marked for identification and ask if you have ever seen it before?

(Witness looks at exhibit)

WITNESS: continuing

A. Yes, I have.

Q. When and where did you see it?

A. At the same time and place as the previous exhibit.

Q. Did you receive it at the exact same time and under the exact same conditions as the finger nail scrapings that you testified?

A. Yes, sir.

Q. Did you run any test on State exhibit number twenty-eight (28) marked for identification?

A. Yes, I have.

Q. What examination did you run on State Exhibit twenty-eight (28) marked for identification?

A. Looked specifically for blood stains and there was a blood stain on the inside cuff of the left sleeve and this was ABO group B, human blood.

Q. Human Blood, group B?

A. Yes.

MR. OLDHAM: Your Honor, at this time, we would like to offer into evidence State exhibit number twenty-eight (28) which would be State Exhibit number nine (9) evidence.

MR. FITZPATRICK: The defendant is gong to have to object to the introduction of this, your Honor—there is no testimony here as to whose shirt it is, what type blood it was . . .

MR. OLDHAM: He testified it was Type Blood B.

MR. FITZPATRICK: I believe the Doctor testified it was BRH positive.

THE COURT: Whose shirt is it?—has it been established?

MR. FITZPATRICK: No, sir.

(Discussion at the bench, Mr. Oldham, Mr. Fitzpatrick and the Court; discussion at the bench ended)

THE COURT: Objection sustained.

MR. OLDHAM (continuing)

Q. I show you State exhibit number thirty (30) marked for identification and ask you if you have seen it before?

(Witness looks at exhibit)

WITNESS (continuing)

A. Yes, sir, I have.

Q. When was the first time that you saw it?

A. That again was submitted by Deputy Hanstein, Citrus County Sheriff's Department, 6th of July, 1973 at 10:30 in the morning.

Q. And, did you run any test on it?

A. Yes, sir, I did.

Q. What kind of test did you run?

A. This was stained with one spot of blood in the neck area, there was insufficient for specie determination or blood type.

Q. I show you State exhibit number thirty-three (33) and thirty-four (34) marked for identification and ask if you have ever seen them before?

(Witness looks at exhibits)

WITNESS (continuing)

Q. Yes. Thirty-three, exhibit thirty-three, was submitted as an exhibit by Investigator Hanstein at the same time and place. Exhibit thirty-four (34) is material that I removed from other exhibits submitted in this case, these are human hair.

Q. What exhibits did you remove State Exhibit thirty-four from?

A. This is exhibit Thirty-four (34)—I removed those from exhibit thirty-one (31) and thirty-two (32).

Q. And what were they?

A. Thirty-one (31) contained five items, six items, ladies peach colored panties, a lady's white bra, a pair of green strip outer pants, and a blue blouse,—and make a note here—they were generally distributed each of these and were bunches of human carcassized [sic] scalp hair which were not significantly different from the hair that was submitted in Exhibit thirty-three (33).

MR. OLDHAM: No further questions.

MR. FITZPATRICK: No questions.

WHEREUPON, the witness was excused.

MR. OLDHAM: That State Rest, [sic] your Honor.

THE COURT: Escort the jury out, please.

WHEREUPON, the jury was escorted from the court room to the jury room.

MR. FITZPATRICK: Let the record show that the defense makes a move for a directed verdict on the grounds that the state has failed to prove that this defendant did in fact commit murder of his wife. There is insufficient facts in the evidence, there is insufficient exhibits, there is nothing here to connect this man with the death of this woman.

MR. OLDHAM: To what I would say, your Honor, the corpus delicti has been shown, the wife of this defendant was murdered as alleged in the indictment, that his defendant was present at the time, one eye witness with him holding his wife's head outside the trailer, there are three or four witnesses including his mother and brother that state to the remarks that he made thereafter, we feel that there is sufficient prima facia case for this jury to consider the verdict.

THE COURT: Motion denied.

WHEREUPON, the jury was returned to the court room and seated in the jury box.

THE COURT: Ladies and gentlemen of the jury, we have come to a breaking point in the proceedings, and I am going, or rather arrangements have been made at Sweat's Resturant for your lunch, arrangements have been made for you to spend tonight at the motel which is directly across the street from Sweat's Resturant. We will take a break at this time and we will come back, you will be brought back in the jury room at Two o'clock this afternoon. Now, you all stay together for the remainder of this trial. I want to again admonish you that you are not to discuss the case among yourselves or with anyone else, nor permit anyone to discuss it in your presence. If anyone does attempt to talk to you about the case, report it to the court. Now, I want to again remind you that you are not to read any newspaper articles or listen to any radio accounts, or television accounts about the trial. This is extremely important, and you must do this. Escort the jury to the jury room.

WHEREUPON, the jury was escorted from the court room to the jury room.

WHEREUPON, the defendant was escorted to the holding room.

THE COURT: Court will be in recess until Two P.M.

WHEREUPON, court was in session after recess; defendant brought into court room and seated at defense table.

MR. FITZPATRICK: If it please the court, I would like to renew at this time my motion for directed verdict and show unto the Court the following: we have had testimony from one, two, three, four, five, six, seven, eight, nine witnesses, two of the witnesses were expert witnesses, one of the witnesses was an ambulance driver. The first two witnesses, Glenda Mae Demney and the gentleman referred to as Buckshot. There is nothing in the testimony of Glenda Mae Demney, there is nothing in the testimony of Buckshot, Nellie Merkerson—that her son made a statement to her roughly that he was beating his wife—David

Merkerson's statements was that 'Dan you have done it this time'.—He said 'yes, I did'—Susan Merkerson heard some thumping noise. Lloyd Shelton testified as great length about what he found in the trailer, the condition of the trailer and so forth. I say to this court that the State has wholly, wholly, failed to show premeditated design on the part of this defendant, and that this Court should direct a directed verdict as to first degree murder.

MR. OLDHAM: Your Honor, in rebuttal thereto, I think that the record will reflect there were eleven witnesses rather than nine. I think a check of the record that what was tesfieid [sic] to that from the second witness that the defendant had his wife outside of her mother's house that night by the hair, and said he was going to beat her, I think the evidence further shows that basically the admissions made to his mother and his half brother were admissions against self interest and guilt, I think both statements, the written statement made to Deputy Shelton and also the oral statement he made to Deputy Shelton shows that he made admission against interest, there is no evidence whatsoever that this man had anything to drink during this whole proceedings, your Honor, there is not one bit of evidence to take this away from first degree. The court has listened to the cause of death and the statements of the pathologist, and we feel the motion for directed verdict should be denied.

THE COURT: Motion denied.

WHEREUPON, the jury was returned to the court room and seated in the jury box.

MR. FITZPATRICK: Defense rest, your Honor.

[Closing arguments of counsel]

MR. FITZPATRICK: We have no objections to the instructions that are to be given and no objections to the forms of the verdict, your Honor.

MR. OLDHAM: State has no objections, your Honor.

WHEREUPON, court was in session, Nine fifty A.M., January 10, 1974; present for the State, Mr. G.G. Oldham, Mr. W.T. Green; present for the defendant, Mr. Charles Fitzpatrick, Mr. Michael Kovach; defendant present and seated at the defense table;

WHEREUPON, the jury was brought into the court room and seated in the jury box:

THE COURT: Ladies and gentlemen of the jury, you have listened carefully to the evidence and to the arguments of the attorneys. I now ask that you give the same careful attention to the law as determined by the court which you must apply to the facts as you find them from the evidence. You alone as jurors sworn to try this case must pass on the issue of facts, and your verdict must be based solely on the evidence or lack of evidence and the law as it is given to you by the court.

The defendant, Daniel Wilbur Gardner is charged with the crime of murder in the first degree in that on June 30th, 1973, in Citrus County, State of Florida, he did unlawfully and from a premeditated design kill Bertha Mae Gardner a human being by striking her with a blunt instrument, a more particular description to this grand jury unknown, did inflict in and upon the body of the said Bertha Mae Gardner did [sic] mortal wound and of which mortal wound the said Bertha Mae Gardner did die in violation of Florida Statute 782.04 (1).

This charge includes the lesser charges of murder in the second degree, murder in the third degree and manslaughter. The killing of one human being by another is called homicide. Every homicide falls within one of these four classes, justifiable homicide, excuseable homicide, murder in the first degree, second or third degree, and manslaughter.

The circumstances of each case determine whether a

homicide is justifiable, excusable, murder or manslaughter.

Justifiable homicide and excusable homicide are lawful; murder and manslaughter are unlawful and constitute violations of the criminal laws.

The essential elements of unlawful homicide, together with other matters that must be proved beyond and to the exclusion of every reasonable doubt in this case before there can be a conviction are: (1) the death of the person alleged to have been killed. (2) that such death was caused by the criminal act or agency of another; (3) that the deceased was killed by the accused.

The killing of a human being by any person is justifiable homicide and lawful, (1) when committed in resisting an attempt to murder such person or to commit any felony upon him, or upon or in any dwelling house in which such person shall be. (2) When committed in the lawful defense of such person, or his or her husband wife, parent, grandparent, mother-in-law, son-in-law, daughter-in-law, father-in-law, child, grandchild, sister, brother, uncle, aunt niece, nephew, guardian, ward, master, mistress, or servant, when there shall be reasonable ground to apprehend a design to commit a felony or do some great personal injury and there shall be imminent danger of such design being accomplished. (3) when necessarily committed in attempting by lawful ways and means to apprehend any person for any felony committed, or in lawfully suppressing a riot; or in lawfully kddping and preserving peace.

A homicide committed in self defense, that is, in the defense of the life of the accused or to protect his person from imminent danger of death or great bodily harm is a justifiable homicide and lawful.

Excusable homicide is homicide which is committed by accident and misfortune in doing any lawful act by lawful means with usual ordinary caution and without any unlawful intent, or by accident and misfortune in the heat of passion, upon any sudden and sufficient provocation, or upon a sudden combat without any dangerous weapon being used and not done in a cruel or unusual manner.

Homicide is excusable and lawful if it is by accident and misfortune in the heat of passion upon any sudden and

sufficient provocation or upon a sudden combat, without— Ladies and gentlemen, I believe this is a duplication of the paragraph I have just read. Let me start again on this last paragraph. Homicide is excusable and lawful if committed by accident and misfortune in the heat of passion upon any sudden and sufficient prov[o]cation, or upon a sudden combat, without any dangerous weapon being used, and not done in a cruel or unusual manner. But if such killing is done by the use of a dangerous weapon, or in a cruel or unusual manner, it is manslaughter.

A sudden and sufficient provocation is something which would naturally and instantly produce in the mind of an ordinary person the highest degree of anger, rage, resentment or exasperation.

The heat of passion is anger, rage, resentment or exasperation so intense as to overcome or suspend the use of ordinary judgment and to render the mind of an ordinary person incapable of calm reflection.

A dangerous weapon is any weapon which, taking into account the manner in which it is used, is likely to produce death or great bodily harm.

Murder in the first degree is the unlawful killing of a human being when perpetrated from a premeditated design to effect the death of the person killed or any human being, or when committed by a person engaged in perpetration of or in attempt to perpetrate any arson, rape, robbery, burglary, kidnapping, air craft pirarcy, or unlawful throwing, placing or discharging of a destructive device or bomb or which resulted from the unlawful distribution of heronine [sic] by a person over the age of seventeen years when such drug is proven to be the proximate cause of death by the user of being murder in the first degree.

A premeditated design to kill is a fully formed conscious purpose to take human life, formed upon reflection and present in the mind at the time of the killing. The law does not fix the exact period of time which must pass between the formation of the intent to kill and the carrying out of the intent. It may be only a short time and yet make the killing premeditated, if the fixed intent to kill was formed long enough before the actual killing to permit of some

reflection on the part of the person forming it, and that person was at the time of carrying out the intent fully conscious of a settled and fixed purpose to kill and of the results which would follow such killing. When such state of mind exists there is a premeditated design to kill, although the killing follows closely upon the formation of the intent.

The question of premeditated design is a question of fact to be determined by the jury from the evidence like every other material fact in the case. The law does not require that a premeditated design by [sic] proved only by direct and positive testimony. The existence of a premeditated design as well as its formation are operations of the mind, as to which direct and positive testimony cannot always be obtained, therefore, the law recognizes that it may be proved by circumstantial evidence. It will be sufficient proof of such premeditated design if the circumstances attending the homicide and the conduct of the accused convinces you beyond a reasonable doubt of the existence of such premeditated design at the time of the homicide.

If a person has a premeditated design to kill one person and in attempting to kill that person actually kills another whom he did not intend to kill, he is nonetheless guilty of murder in the first degree.

The killing of a human being in committing or in attempting to commit any arson, rape, robbery, burglary, kidnapping, air craft pirarcy, or the unlawful throwing, placing of a destructive device or bomb, or which resulted from the unlawful distribution of heroin by a person over the age of seventeen years when such drug is proven to be the proximate cause of the death of the user shall be murder in the first degree even though there is no premeditated design or intent to kill.

The punishment for murder in the first degree is life or death as may be determined by the court in a later proceeding.

Murder in the second degree is the killing of a human being by the perpetration of an act imminently dangerous to another and evincing a depraved mind regardless of human life although without any premeditated design to effect the death of any particular individual or when committed in the perpetration of or attempt to perpetrate any arson, rape, robber, burglary, kidnapping, air craft pirarcy, or unlawfully throwing, placing or discharging of a destructive device or bomb. The punishment by law of murder in the second degree is imprisonment in the state prison for life, or for such term as may be determined by the court.

Murder in the third degree is the unlawful killing of a human being when perpetrated without any design to effect death by a person engaged in the perpetration of or the intent to perpetration any felony other than arson, rape, robbery, burglarly, kidnapping, air craft pirarcy [sic], or unlawful throwing, placing or discharging of a destructive device or bomb. Punishment provided by law for murder in the third degree is imprisonment in state prison for a term of years to be fixed by the court, but not exceeding fifteen years.

Manslaughter is the killing of a human being by the act, procurement, or culpable negligence of another in cases where such killing shall not be justifiable or excusable homicide or murder.

Negligence is the failure to use reasonable care. Reasonable care is that degree of care which a reasonably careful person would use under like circumstances. Negligence may consist either in doing something that a reasonably careful person would not do under like circumstances or in failing to do something that a reasonable careful person would do under like circumstances. Culpable negligence is the conscious doing of an act or following a course of conduct which any reasonable person would know would likely result in death or great bodily injury to some other person when this is done without the intent to injure any person but with utter disregard for the safety of others. The punishment provided by law for manslaughter is imprisonment in state prison for not more than fifteen years.

To summarize the essential elements of an unlawful homicide which must be proved beyond a reasonable doubt in this case before there can be a conviction of any offense, are as follows: (1) that Bertha Mae Gardner is in fact dead; (2) that she was killed by the defendant; (3) that the killing was wrongful and by the means stated in the indictment; (4) that the killing was neither justifiable or excusable

homicide. If these elements are established, then it would be necessary for you to determine the degree of the unlawful homicide. If the defendant in killing the deceased acted from a premeditated design to effect the death of the deceased, or some other human being, or in the perpetration of or in the attempt to perpetrate arson, rape, robbery, burglary, kidnapping, air craft pirarcy [sic], or unlawful throwing, placing, or discharging of a destructive device or bomb or which resulted from the unlawful distribution of heroin by a person over the age of seventeen years of age when such drug is proven to be the proximate cause of the death of the user, he should be found guilty of murder in the first degree. If the killing was not from a premeditated design to effect the death of any human being, but was in the perpetration of an act imminently dangerous to another and evincing a depraved mind regardless of human life although without any premeditated design to effect the death of any particular individual, or when committed in the perpetrating act or in the attempt to perpetrate any arson, rape, robbery, burglary, kidnapping, air craft pirarcy [sic], or unlawful throwing, placing, or discharging of a destructive device or bomb, he should be found guilty of murder in the second degree.

If the killing took place while the defendant was engaged in the commission of a felony other than arson, rape, robbery, burglarly, kidnapping, air craft pirarcy, or unlawful throwing, placing or discharging of a destructive device or bomb, the defendant should be found guilty of murder in the third degree.

If the killing were by act, procurement, or culpable negligence of the defendant and was not murder in any degree or justifiable or excusable homicide, the defendant should be found guilty of manslaughter.

If any of the essential elements of homicide have not been proved beyond a reasonable doubt, the defendant should not be found guilty.

If you find the defendant guilty of murder in the first degree, then at a later proceeding, you will render an advisory sentence to the court recommending that the defendant be sentenced to life or death. The court may accept such

recommendation and sentence the defendant as recommended, or it may under such circumstances reject such recommendations and sentence the defendant to either life or death.

The defendant has entered his plea of not guilty. The effect of this plea is to require the State to prove each material allegation of this indictment beyond and to the exclusion of every reasonable doubt before the defendant may be found guilty.

It is to the evidence and to it alone that you are to look for such proof.

It is not necessary that the State prove that the crime was committed on the exact date alleged in the indictment. A conviction of murder in the first degree may be had upon proof that the crime was committed at any time prior to filing of the indictment, but if the evidence does not justify conviction of murder in the first degree then before there can be a conviction of any lesser included offense, you must find that the lesser included offense was committed within two years immediately prior to the filing of this indictment.

Proof that the crime was committed in Citrus County named in the indictment need be only with reasonable certainty. It need not be proved beyond a reasonable doubt.

The defendant in every criminal case is presumed to be innocent until his guilt is established by the evidence to the exclusion of and beyond every reasonable doubt.

Before the presumption of innocence leaves the defendant, every material allegation of the indictment must be proved by the evidence to the exclusion of and beyond every reasonable doubt. The presumption accompanies and abides with the defendant as to each and every material allegation in the indictment through each stage of the trial until it has been overcome by the evidence to the exclusion of and beyond a reasonable doubt.

If any of the material allegations of the indictment is not proved to the exclusion of and beyond every reasonable doubt, you must give him the benefit of the doubt and find him not guilty, but if you find from the evidence beyond and to the exclusion of every reasonable doubt that all the ma-

terial allegations of the charge have been proved then you must find him guity.

To overcome the presumption of innocence of the defendant and establish his guilt, it is not sufficient to furnish evidence merely tending to prove guilt, nor to prove a mere probability of guilt, but proof of guilt to the exclusion of and beyond every reasonable doubt is absolutely necessary.

You must carefully, impartially and conscientiously consider, compare, and weigh all the evidence, and if after doing this you feel that your understanding, judgment and reason are well satisfied and convinced to the extent of having a full, firm and abiding conviction that the charge has been proved to the exclusion of and beyond a reasonable doubt, it is your duty to find the defendant guilty.

A doubt which is a mere possible doubt a speculative, imaginary or forced doubt, is not a reasonable doubt, and for the reason that everything relating to human affairs is open to some doubt of this kind, such a doubt must not influence the jury to return a verdict of not guilty where they have an abiding conviction of guilt. On the other hand, if, after carefully considering, comparing, and weighing all the evidence, there is not an abiding conviction of guilt, or, if, having a conviction it is one which is not stable but one which wavers and vacillates, then the charge is not proved beyond a reasonable, beyond every reasonable doubt and you must find the defendant not guilty because the doubt is reasonable.

It is to the evidence introduced upon this trial and to it alone that you are to look for such proof.

A doubt which is not suggested by, or does not arise from the evidence or the lack of evidence, is not a reasonable doubt and should never be considered. In other words you have no right to go outside the evidence for doubts of any kind; however, a lack of evidence or an insufficiency of evidence may create a reasonable doubt.

You are the sole judges of the weight and sufficiency of the evidence and of the credibility of the witnesses.

You should reconcile any conflicts you find in the evidence without inputing untruthfulness to any witnesses. If you cannot reconcile any conflicts you find, then it is your duty

to reject the evidence you find to be unworthy of belief and to accept and rely upon the evidence you find worthy of belief.

In determining the believability of any witness and the weight to be given his testimony, you may properly consider the demeanor of the witness while testifying, his frankness or lack of frankness, his intelligence, his interest if any in the outcome of the case, the means and opportunity he had to know the facts about which he testified, his ability to remember the matters about which he testified, and the reasonableness of his testimony considered in the light of all the evidence in the case.

From these and all other facts and circumstances in the evidence you must reach your own independent conclusions and in so doing you should use the same common sense, sound judgment and reason that you use in everyday life.

An expert witness is one who by education training or experience, has become expert in any art, science, profession, business or calling. An expert witness is permitted to give his opinion as to matters in which he is an expert, and may also state the reasons for his opinion.

You should consider each expert opinion received in evidence and give it the weight you think it deserves, and you may reject it entirely if you find that the alleged facts upon which it is based have not been proved or that the reasons given in support of the opinion are not sound.

If you find there is an absence of evidence suggesting a motive for the defendant to commit the crime charged, the absence of such motive is a circumstance which you should consider. However, proof of motive is never necessary to a conviction.

In every criminal proceeding a defendant has the absolute right to remain silent. At no time is it the duty of a defendant to prove his innocence. From the exercise of a defendant's right to remain silent a jury is not permitted to draw any inference of guilt, and a defendant's failure to take the witness stand must not be considered in any manner as admission of guilt, nor should his failure to take the witness stand influence your verdict in any manner whatsoever.

A statement made out of court by a person charged with crime should be received and acted upon with great caution. It cannot be considered as evidence against him unless it was freely and voluntarily made. Any statement made because of or induced by any threat, promise or other inducement held out to the defendant by anyone was not freely and voluntarily made and should be wholly disregarded.

A statement voluntarily made should be given fair and unprejudiced consideration with due regard to the time and circumstances under which it was made, its harmony or inconsistency with other evidence as well as the motives shown by the evidence to have influenced the making of the statement. You may believe any part of such a statement which you find to be true and reject those parts which you find to be untrue.

Circumstantial evidence is legal evidence and a crime or any fact to be proven may be proved by such evidence. A well-connected chain of circumstances is as conclusive in proving a crime or fact as is positive evidence. Its value is dependent upon its conclusive nature and tendency.

Circumstantial evidence is governed by the following rules: (1) The circumstances themselves must be proved beyond a reasonable doubt. (2) The circumstances must be consistent with guilt and inconsistent with innocence. (3) The circumstances must be of such a conclusive nature and tendency that you are convinced beyond a reasonable doubt of the defendant's guilt or the fact to be proved.

If the circumstances are susceptible of two equally reasonable constructions, one indicating guilt and the other innocence, then you must accept that construction indicating innocence.

Circumstances which standing alone are insufficient to prove or disprove any fact may be considered by you in weighing direct and positive testimony.

You are to disregard the consequences of your verdict. You are empaneled and sworn only to find a verdict based upon the law and the evidence. You are to lay aside any ideas that you may have about the wisdom or lack of wisdom, of any particular law or procedure touching upon this

case. You are to consider only the testimony that you have heard along with the other evidence which has been received and the law as given to you by the Court.

You are to lay aside any personal feeling you may have in favor of or against the State, and in favor of or against the defendant. It is only human to have personal feeling or sympathy in matters of this kind, but any such personal feelings or sympathy has no place in the consideration of your verdict.

You are not to be concerned with the imposition of any penalty in the event you reach a verdict of guilty. Just as the determination of the guilt or innocence of the accused rests solely and absolutely with you, so also does the determination of the extent of punishment within the limits prescribed by the law, test solely and with the Court.

When you have determined the guilt or innocence of the accused you have completely fulfilled your solemn obligation under your oaths.

Provisions for probation, parole, pardon, or reduction of sentence of convicted persons are a part of the laws of this State. These laws are administered by public officials as authorized by the law.

Whatever verdict you render must be unanimous. The verdict must be the verdict of each juror as well as the jury as a whole.

The indictment charges the crime of murder in the first degree which includes as a matter of law the lesser crimes of (1) Murder in the Second Degree, (2) Murder in the Third Degree, and (3) Manslaughter.

You may find the defendant guilty as charged in the indictment or guilty of such lesser included crime as the evidence may justify. You may return one of the following verdicts: (1) Not guilty; (2) Guilty of Murder in the first degree as charged in the indictment; (3) Guilty of Murder in the Second Degree; or Murder in the Third Degree; or Manslaughter.

If you return a verdict of guilty, it should be for the highest offense which has been proved beyond a reasonable doubt. If you find that no offense has been proved beyond a

reasonable doubt, then of course your verdict must be not guilty.

I have some verdicts for you here which I will read to you, the first one is, we the jury find the defendant Daniel Wilbur Gardner guilty as charged in the indictment, murder in the first degree, so say we all, dated this blank day of January, 1974, and a place for your foreman to sign. The next verdict is: we the jury find the defendant Daniel Wilbur Gardner guilty of murder in the second degree, so say we all, dated this blank day of January 1974, and a place for your foreman to sign. The next verdict is: we the jury find the defendant Daniel Wilbur Gardner guilty of murder in the third degree so say we all, dated this blank day of January 1974, and a place for your foreman to sign. The next verdict is: we the jury find the defendant Daniel Wilbur Gardner guilty of Manslaughter so say we all, dated this blank day of January, 1974, and a place for your foreman to sign. The next verdict is: we the jury find the defendant, Daniel Wilbur Gardner, not guilty, so say we all, dated this blank day of January 1974, and a place for your foreman to sign.

Now, you are here only to determine the guilt or innocence of the defendant. So if the evidence convinces you beyond every reasonable doubt of the guilt of the defendant then you should find him guilty even though you may believe one or more persons are also guilty.

The defendant is not on trial for any act or conduct not charged in the indictment or included within the lesser offenses and you must consider the evidence only as it relates to this charge.

Nothing that I have said in these instructions, or at any other time during the trial, is any intimation whatever as to what verdict I think you should find. The verdict is the sole and exclusive duty and solemn responsibility of you the jury and neither the Court nor anyone else can help you in performing that duty.

It is your solemn obligation not to be swayed or influenced in any manner by any sympathy or prejudice that you have either for or against the defendant or for or against the State. In arriving at your verdict you must be

guided solely by the evidence and these instructions, and you cannot let any outside influence enter into your deliberations on your verdict.

If after having heard all the evidence and the law as given you by the Court, you have any reasonable doubt as to the defendant's guilt of any crime within the charge you must find him not guilty. However, if you are satisfied beyond every reasonable doubt of his guilt it is your duty to find him guilty of such crime as to which you are satisfied of his guilt beyond every reasonable doubt.

If while you are deliberating you wish to examine—I will give to the bailiff to deliver to you all of the exhibits which have been introduced into evidence, so that you may take them into the court room with you.

Your first duty upon retiring will be to elect a foreman to preside over your deliberations and sign your verdict, when you have arrived at one.

Mr. Bailiff, if you would get the verdicts and instructions which I am going to deliver to the jury and a copy of the indictment.

I would like to ask the State and the Defendant if they have any additions or corrections to the instructions as given?

MR. GREEN: None, your Honor.

MR. KOVACH: None, your Honor.

THE COURT (continuing) If you would deliver this to the jury—

(The court hands exhibits, instructions and indictment to bailiff) Forms of verdicts, copy of indictment, instructions, and all exhibits introduced into evidence.

THE COURT: The two alternates are now excused.

WHEREUPON, the jury retired to the jury room at 10:33 A.M.

THE COURT: Escort the defendant to the holding room.

(Whereupon, the defendant was escorted to the holding room)

THE COURT: Court is in recess until the jury returns.

WHEREUPON, the jury returned to the court room at 12:20 P.M., (Defendant was seated at defense table with counsel)

THE COURT: The bailiff advises me that members of the jury have a question that they would like to ask the court?

MR. FOREMAN: Your Honor, I was elected foreman—we would like to have certain testimony read to us to decide the degree. First one would be the doctor's statement—

THE COURT: Just a minute, gentlemen—

MR. FOREMAN: The second is the conversations between the two brothers, and the third item is Lloyd' Shelton's testimony.

THE COURT: You are requesting that all of the testimony of those three witnesses be read back to you?

(At the bench)

MR. PIERCE: Let the record reflect that the public defender object to the re-hearing of the testimony, of any testimony.

MR. OLDHAM: The complete testimony of the witnesses will be heard by the jury rather than just statements or parts of testimony of each witness, the entire testimony of those three witnesses will be re-played for the jury

IN OPEN COURT:

THE COURT: Now, let me get it straight just which testimony it is you wish—the testimony of the Doctor, and—

MR. FOREMAN: The conversation between the two brothers.

THE COURT: All right, and the testimony of Lloyd Shelton. This will take the court reporter a little while to get that portion of the transcript picked out, so I am going to send you back to the jury room and we will order your lunch.

WHEREUPON, the jury was returned to the jury room.

WHEREUPON, the defendant was returned to the holding room.

THE COURT: Court is in recess.

WHEREUPON, court was in session, 2:00 P.M., present for the state, Mr. W.T. Green; present for the defendant, Mr. Michael Kovach; defendant seated at table with defense counsel.

WHEREUPON, the jury was returned to the court room and seated in the jury box.

WHEREUPON, the recorded testimony of the witness DAVID MERKERSON was played to the jury. (See page 200, line 10)

THE COURT: Mrs. Davis, do you certify that the testimony of David Merkerson that you have just played to the jury is a correct reproduction of the testimony actually given by him during this trial as verified by your shorthand notes?

COURT REPORTER: Yes, sir.

WHEREUPON, the recorded testimony of the witness, LLOYD SHELTON was played to the jury. (See page 216, line 5)

THE COURT: Mrs. Davis, do you certify that the testimony of LLOYD SHELTON that you have just played to the jury is a correct reproduction of the testimony actually given by him during this trial as verified by your shorthand notes?

COURT REPORTER: Yes, sir.

WHEREUPON, the recorded testimony of the witness, DR. WILLIAM H. SHUTZE was played to the jury, the record being stopped during the portion while jury had been removed from the court room, resumed when jury was returned to the court room. (See page 252, line 1)

THE COURT: Mrs. Davis, do you certify that the testimony of DR. SHUTZE that you have just played to the jury is a correct reproduction of the testimony actually given by him during this trial as verified by your shorthand notes?

COURT REPORTER: Yes, sir.

THE COURT: Members of the jury, do you feel that this answers your quesions that you had?

JURORS: Yes, sir.

WHEREUPON, the jury was escorted to the jury room, at 3:15 P.M.

WHEREUPON, the defendant was escorted to the holding room.

THE COURT: Court will be in recess until the jury returns.

WHEREUPON, court was in session, 4:05 P.M.; present for the state, Mr. G.G. Oldham, Mr. W.T. Green; present for the defendant Mr. Charles Fitzpatrick, Mr. Michael Kovach; defendant present and seated at defense table.

WHEREUPON, the jury was returned to the court room:

THE COURT: Mr. Foreman, has the jury arrived at a verdict?

FOREMAN: We have, sir.

THE COURT: Hand it to the bailiff, please?

(Foreman hands paper to bailiff, bailliff hands paper to the Court)

THE COURT: Publish the verdict.

DEPUTY CLERK: In the Circuit Court of the Fifth Judicial Circuit of the State of Florida, in and for Citrus County, Criminal Case number 73-132, CA-01, State of Florida vs. Daniel Wilbur Gardner, defendant, verdict: We the jury find the defendant, Daniel Wilbur Gardner, guilty as charged in the indictment of Murder in the First Degree, so say we all, dated this the 10th day of January, 1974, signed Joseph F. Schoen, foreman of the Jury.

THE COURT: Based on the verdict, the court hereby adjudicates the defendant guilty of Murder in the First Degree. Now, members of the jury, you have just completed the first phase of this trial. We will now commence the second phase or the sentencing proceeding during which time aggravating circumstances and also mitigating circumstances can be presented to you, the jury, to assist you in rendering an advisory sentence to the court.

MR. OLDHAM: Mr. Green will represent the State, your Honor.

MR. FITZPATRICK: Mr. Kovach will represent the defendant.

MR. GREEN: If your Honor please, certain photographs have been previously marked for identification, photograph marked for identification number eight (8), another photograph marked for identification number six (6), and photograph marked number one (1). We would move that each of these photographs be introduced for purposes of showing to

the jury at this time for the purpose of showing aggravating circumstances as provided by law.

MR. KOVACH: To which the defendant would strongly object, your Honor, on the basis that there are already photographs in evidence that are admissable [sic] and usable under this circumstances of the particular portion of the case, and there would be no value gained by further submission of potentially inflammatory material.

THE COURT: Motion denied.

(Whereupon exhibits were marked as evidence)

MR. KOVACH: I would like to extent the argument [sic], if the Court would grant me a moment, in that it is conceivable that the appropriative [sic] value of the evidence being submitted would be grossly exaggerated in that [it] would not represent the body of the deceased as it was in fact at the time of the commission of the crime but rather that it would be conceivable that the evidence would show the pictures that are being proferred would be taken, would be pictures that were taken in the midst of the autopsy performed on the deceased and therefore marks or conditions of the body at the time are not the condition of the body at the time of the crime and as a consequence it would be grossly prejudicial to the defendant's plea for mercy in this matter.

MR. GREEN: In rebuttal, your Honor, we would point to the court section 72-724, section One, which I would like to read a portion to his Honor.—procedure shall be conducted before the jury empanneled [sic] for that purpose, in the proceeding, evidence may be presented as to any matter that the court deems relevant and shall include all factors, and we shall be presenting sub-section H, that the capital felony was especially heinous, atrocious or cruel.

MR. KOVACH: Your Honor, in rebuttal, that goes to the heart of my argument, in that the evidence that is being submitted is not evidence that existed at the time of the crime, but is in fact potentially or potential mutalation [sic] to the body in an attempt to perform the medical autopsy, and is severally prejudicial.

THE COURT: Let me see the pictures.

(Pictures handed to the Court)

THE COURT: State Exhibit marked for identification number eleven (11),—the defendant's motion is granted as to exhibit eleven and this will not be shown.

MR. KOVACH: Thank you, your Honor.

MR. GREEN: I would like to show the jury these two photographs, your Honor, that have been marked.

(Jurors examine photograph)

MR. GREEN: If your Honor please, the State will place no additional evidence at this time.

MR. KOVACH: May it please the court, the defense will call Daniel Gardner.

WHEREUPON, DANIEL WILBUR GARDNER having been sworn, testified as follows:

DIRECT EXAMINATION BY MR. KOVACH:

Q. State your name please for the jury?
A. My name is Daniel Wilbur Gardner.
Q. What is your age, sir?
A. My age is thirty-nine years of age.
Q. How many children do you have, sir?
A. Have four small children.
Q. Give their names and ages, please?
A. I have Melanie—Gardner, approximately five and a half years old, I have Daniel Wilbur Garner, II, approximately four years old, I have Michelle Lynn Gardner, approximately three years old, and I have Kimberly Ann Gardner, approximately eleven moths old.
Q. Mr. Gardner, the day before this situation occurred, or let's say in the morning, the morning when you woke up before all of this occurred, would you attempt to retrace your steps for this court and this jury throughout the day?
A. I will do my best.
Q. Your Honor, before we start, may we waive our normal question and answer routine temporarily and allow the defendant to speak at will?
A. On the morning of the 29th of June, I woke up in the morning, my wife woke me up, I had me a cup of coffee, asked me if I was ready to get up, I guess it was about, I would say Seven o'clock. We got up—I'm sorry—I drank

my coffee in bed, I heard the kids in there, having their breakfast at the table, I finished my coffee, and went into the living room, and I sat on the couch, finished my coffee, and she asked me if I wanted some breakfast and I said 'no, I didn't want any', I just had some coffee, so . . .
Q. Mr. Gardner, did anyone come to your house that morning;
A. Yes.
Q. Who?
A. Mr. Wayne Richie.
Q. About what time?
A. Approximately Ten o'clock that morning.
Q. Did you leave the house with Mr. Richie?
A. Yes, sir.
Q. Did you have anything alcoholic to drink that morning while you were at home?
A. Not while I was home, no, sir.
Q. Did you leave with Mr. Richie?
A. Yes, sir.
Q. Where did you go?
A. We got in his car, and we drove out I believe it was to the Sugar Mill Tavern, Mr. Richie's girl friend was bar maid there.
Q. Did you have anything to drink at the Sugar Mill?
A. Yes, I believe we did.
Q. Can you tell the jury how much you had to drink?
A. I would say two shots of Canadian Club.
Q. How long did you stay at the Sugar Mill?
A. We stayed there about an hour.
Q. Did you leave with Mr. Richie?
A. Yes.
Q. Where did you go?
A. We rode back in to Homosassa and we stopped at a Jiffy Store, we bought a six pack of beer.
Q. About what time was this?
A. I would say about Eleven fifteen.
Q. In the morning?
A. Yes.
Q. At this point had you had anything to eat?
A. No, sir.

Q. Did you drink any part of that six pack of beer?
A. Yes, sir.
Q. Do you recall how much?
A. I drank three cans.
Q. Where did you go after you purchased the beer?
A. We went riding, down around town and we went down to see my cousin, Jerry Oliver, was in the yard, so we stopped the car, and we got out to go see what they were doing.
Q. Did you have anything to drink while you were there?
A. Yes, sir.
Q. What did you drink while you were there?
A. I would say two beers.
Q. Was this still from what you bought at the Jiffy Store?
A. No, sir, one of them was and one of them they had it.
Q. Approximately how long did you stay there?
A. I would say about thirty minutes.
Q. All right. Did you leave there with Wayne Richie?
A. Yes.
Q. Anyone else?
A. Yes.
Q. Who?
A. Jerry Oliver, Wayne Richie and I.
Q. Where did you go?
A. We rode down to the end of what they call Mason Creek Road, Homosassa.
Q. Did you have anything to drink while you were there?
A. Yes, sir.
Q. What was that?
A. Vodka.
Q. One shot?
A. We had approximately three shots of Vodka each.
Q. Straight?
A. No, sir, we had orange juice mixed with it.
Q. Was this noon time?
A. Around noon time.
Q. What did you do then?
A. We went back up towards town, with intention of going back to the Sugar Mill. Jerry Oliver suggested we

drop him off at his car. We dropped him off at his car, and Wayne Richie and I proceeded back to the Sugar Mill.
Q. Did you have anything to drink when you went back to the Sugar Mill?
A. Yes, sir, best of my memory we had one drink there.
Q. What was that?
A. Canadian Club.
Q. Did you stay at the Sugar Mill all afternoon?
A. No, sir.
Q. Where did you go from there?
A. From there we went back into Homosassa, back to the Jiffy Store. He bought another six pack of beer. We opened one there, and we decided to run to Crystal River.
Q. Where did you go in Crystal River?
A. Well, we went to the Tangerine Lounge, but we did not go inside, as I recall. We decided to come back down to Homosassa Springs, to a place called 'My Brother's Place', a tavern.
Q. Had you completed drinking the six pack by the time you got back to 'My Brother's Place'?
A. From what I remember, we had drank four out of that six pack. In Crystal River we stopped at the Service Station, and we had two beer and they were hot and we decided to buy a cold six pack.
Q. At My Brother's Place?
A. No, sir, at the service station.
Q. Did you drink some of those before you got back to 'My Brother's Place'?
A. We drank one each, on the way.
Q. What did you drink when you got there?
A. We went in and ordered a beer.
Q. How long did you stay at 'My Brothers Place'?
A. I would say most of the evening.
Q. Was it dark by the time you left there?
A. I don't have a true mind on that but it seems to me like it was late in the evening.
Q. Did you have anything to eat?
A. No, sir.
Q. It was late in the evening and you still hadn't had anything to eat all day, is that correct?

A. To the best of my knowledge, it seems like it was dark. We hadn't had anything to eat.

Q. How did you get back to the Sugar Mill?

A. Wayne Richie and myself drove back to the Sugar Mill.

Q. Were you driving during this day?

A. No, sir, I was riding.

Q. Would you break in your trend just a moment and tell us why you had gone out with Wayne Richie that day?

A. He and I had gone the day before and inquired about a job, we had gotten a job and we was to go to work the following Monday at Seven o'clock.

Q. Was this drinking trip, was this any thing that was done in anger?

A. No, sir.

Q. Were you celebrating the acquisition of a job?

A. Had that tendency.

Q. So you got back to the Sugar Mill?

A. Yes, sir.

Q. How much did you have to drink while you were there at the Sugar Mill?

A. I can remember two or three drinks of Canadian Club whiskey.

Q. Do you have any idea what time you arrived at the Sugar Mill?

A. No, sir, I would say somewhere between dark and nine o'clock.

Q. When did you first see your wife that evening?

A. I saw my wife when she came through the door of the Sugar Mill tavern.

Q. Do you know what time that was?

A. Best of my knowledge it was about ten forty-five or Eleven o'clock.

Q. Did you greet your wife?

A. Yes.

Q. Did you sit down and talk to your wife?

A. Yes, sir.

Q. Could you tell us what you talked about? Was there an argument between you?

A. No, sir. No arguments.

Q. Did you buy your wife a drink?

A. Yes, sir.

Q. Did you buy your wife more than one drink?

A. I think we had a couple after she came in.

Q. Do you know what type of liquor she was drinking?

A. Best of my knowledge, I was drinking Canadian Club and Coke.

Q. And her?

A. I think she was drinking Segram and Seven. I believe it was.

Q. When she first came in the Sugar Mill, that was the first time you had seen her since early that morning, is that correct?

A. Yes, sir.

Q. Were you able to tell whether or not she had been drinking at that time?

A. To me, I knew my wife very well, and to me she looked like she had drank something. How much I don't know. She looked to me like she had drank something.

Q. Did you and your wife get into any argument at all?

A. No, sir.

Q. Was—excuse me, what time did you leave the bar?

A. To the best of my knowledge, it was around Eleven thirty.

Q. Who decided to leave, you or your wife?

A. I did.

Q. Did your wife come willingly?

A. Yes, sir.

Q. Was there any discussion about going home?

A. No, sir, I asked her was she ready to go home, it was close to closing time, and she said 'when ever you are'.

Q. Did you take any liquor home with you?

A. Yes, sir, I remember something about buying some liquor.

Q. Do you know what you bought?

A. I believe it was a Fifth of Canadian Club whiskey.

Q. Did you buy that as you were leaving?

A. No, sir, it seems like I had bought this before, before we left.

Q. Was it full when you left?

A. To my knowledge, yes.
Q. Do you recall having broken the seal on this?
A. No, sir, I do not recall.
Q. How did you get home? Who took you home?
A. I believe Wayne Richie took me home.
Q. Who was in the car with you and wife?
A. To the best of my knowledge, a young boy.
Q. Do you know his name?
A. Calvin—Calvin something.
Q. Your wife with you?
A. Yes, sir.
Q. Were you drinking on the way home?
A. I believe we had a drink, yes, sir.
Q. Did you and your wife have any discussion on the way home?
A. I don't remember.
Q. Do you recall anything that happened on the way home?
A. No, sir, only thing I remember, when we got there in front of the house, me telling Wayne Richie let's have a night cap from the bottle.
Q. Is that when the bottle got opened or was it before that?
A. I don't remember.
Q. No argument between you and your wife?
A. Not that I recall.
Q. Did you have, in fact, a night cap with Wayne Richie?
A. Yes, sir.
Q. Did your wife go in the house willingly?
A. She stayed there until we had the drink, and she and I both got out of the car, but as far as going in the house, yes, sir, she went in willingly.
Q. There was no argument?
A. No, sir.
Q. Did an argument occur after you got in the house?
A. The only argument we had when we got in the house, that I can recall, was about my children.
Q. Were your children at home when you got home?
A. No, sir.
Q. Did you ask your wife where the children were?

A. Yes, sir.
Q. Did she tell you?
A. No, sir.
Q. What did she tell you?
A. When I first asked her, I said 'who has got the children?', and she asked me wouldn't I like to know, and I said 'yes, I certainly would', and she said 'well, why don't you find out', and then I asked her, I said 'does your mother have the children', 'have our children', and she said 'well, why don't you go find out', so I said 'O.K., I will'. . .
Q. Did you in fact go next door to see if your mother-in-law had your children?
A. Yes, sir, I did.
Q. Did she have the chidlren?
A. No, sir.
Q. Did you have an argument with your wife at this point?
A. No, sir.
Q. Do you recall any part of what happened from this part forward?
A. You mean—back?
Q. You went over to see Mrs. Demeney . . .
A. Yes, sir.
Q. Had a discussion with her?
A. No, sir. I wouldn't call it a discussion.
Q. Well, it was a conversation, or argument?
A. Yes, sir.
Q. Did you then go back to the house? to your trailer?
A. Not at that time, no, sir.
Q. Was your wife with you when you had this argument with your mother-in-law?
A. She had come up afterwards. During the time, she had come up.
Q. Was she dressed?
A. No, sir.
Q. Did she have any clothes on at this time?
A. No, sir.
Q. Did you take your wife back home?
A. No, sir.
Q. Did you try?

A. I don't remember, but at that time, I know I didn't take her back home.

Q. Did you stay out in the yard with your wife?

A. I don't remember, sir.

Q. Do you recall anything further that night?

A. I would like to, to tell what happened at my mother-in-law's door.

Q. We are talking about what transpired after you left—after you left your mother-in-law's door.

A. The next thing I remember, my wife and I was on the road, and she was—from what I remember—she was fussing with me, and I had her by the arm, and I said 'come on, let's go back to the house', and she snatched her arm away from me, and when she done this, she fell on the lime rock road . . . she stumbpled [sic] around and tried to get up and I tried to help her up, and every time I would try to help her up, she would snatch away from me and tell me to leave her alone, she would get up by herself.

Q. Were you fighting with your wife?

A. No, sir.

Q. Did you at any time this night fight with your wife?

A. No, sir.

Q. Actually argue with her about something?

A. The only argument we had was about my children.

Q. Did she ever tell you where your children were?

A. No, sir.

Q. Did your argument continue after you got her back in the house? About where the children were?

A. No, sir.

Q. Did you finally get her back in the house?

A. Yes, sir.

Q. After you got her in the house, did you put her to bed?

A. No, sir, she had fell in the yard . . .

Q. What?

A. From the road to the house, she fell out in the yard. The yard is dirt, and and I grabbed her, when she fell, I grabbed and tried to get her up, and she was fussing with me, snatching away from me, told me she could do it herself, and then she was just laying there and and seems to

me like then, . . and then Is when I called Mr. Buckshot and asked him if he would come help me to get my wife in the house, she was acting too crazy . . .

Q. Did he help you get her in the house?

A. He tried to help me get her in the house, yes, sir.

Q. You did ultimately get her in the house?

A. Yes, sir.

Q. Did you make any attempt to try to clean her up?

A. Yes, sir.

Q. Was she in fact wounded as a result of these falls in the yard?

A. Yes, sir.

Q. Did you in fact put your wife to bed? Or did she go on her own?

A. She walked on her own to bed.

Q. Did you have any difficulty in getting her cleaned up?

A. Yes, sir, I did.

Q. Did this difficulty include the possibility that she might fall?

A. Yes, sir.

Q. More than once?

A. Yes, sir.

Q. Where did you clean her up?

A. In the bath tub.

Q. Do you recall ever having beaten your wife that night?

A. No, sir, I don't.

Q. Do you recall anything more occurring that night?

A. Yes, sir, I do.

Q. Did anything occur while she was in bed?

A. Yes, sir.

Q. Did, in fact, she want to continue this argument?

A. Yes.

Q. Did you attempt to stop the argument?

A. Sir, the argument was that she didn't want to go to bed, I think, at the time and that was what we was arguing about.

Q. Did you attempt to restrain her and make her stay in bed?

A. No, sir.

Q. Did you at any time hold on to her hair in an attempt to hold her head down on the pillow?

A. No, sir.

Q. Would she have been able to get up had she wanted to?

A. I would think so, yes.

Q. Did you beat her while she was on that bed?

A. No, sir, I did not.

Q. Did you hit her?

A. I remember hitting her with the back of my hand.

Q. Hitting her face?

A. No, sir.

Q. Hitting her body?

A. Yes, sir.

Q. Was this done in anger?

A. No, sir.

Q. Did you have—did you understand when striking her that this might have occurred?

A. No, sir.

Q. Did you understand what was happening?

A. No, sir.

Q. Can you tell this Court how many drinks you think you had during the course of that entire day?

A. No, sir, I couldn't attempt—

Q. Was the fact that you were not able to find your children when you got home present a serious problem to you?

A. Do you mean if there was an argument?—I don't understand the question.

Q. When you got home and your wife refused to tell you where your children were, that is what you testified to, and in fact told you to go find out where they were best you could, is that correct?

A. Yes, sir.

Q. Did that seriously disturb you or anger you or create any problems for you? Mental problems?

A. No, sir.

Q. Did it create enough of a problem that you were not in control of your mind at that time?

A. No, sir.

Q. Do you think that the fact that your wife continued to

argue with you or fuss at you and refuse to tell you where your children were, did this create an argument to continue for any length of time?—that is that maybe she antagonized you some?

Q. I don't remember, sir,—I don't remember.

Q. Did you understand that by slapping your wife with the back of your hand the possible possibility that you could kill her?

A. No, sir, I did not understand anything at that time.

Q. Did you ever have an intent to kill your wife?

A. No, sir.

Q. Was you aware of what was going on that night after you got home, now in that respect, were you aware of . . .

A. No, sir. I wasn't in my mind, no sir.

MR. KOVACH: That's all I have at this time.

CROSS EXAMINATION BY MR. GREEN:

Q. May it please the court—Mr. Gardner, it seems that you have excellent memory of the facts and circumstances and total detail of what occurred on that afternoon and night, is that correct, as you have described them?—you remember well what happened?

A. No, sir.

Q. You sat here, Mr. Gardner, yesterday and today, and heard the Doctor describe how your wife, Bertha, was beaten, didn't you?

A. I heard his report, yes, sir.

Q. And you tell us now that you hit her one time?

A. No, sir, I didn't say that.

Q. What did you say?

A. I said I remember hitting her with the back of my hand.

Q. Earlier, you told us that you were the father of four children?

A. Yes, sir, I am.

Q. And you named them and told us how old they were—did you think about them when you were doing this to your wife?

A. Sir, I wasn't in my right mind.

Q. Awhile ago, I remember you telling the jury that you were trying to get Bertha Mae into the house, and she fell, is that correct?

A. I don't understand, which fall?

Q. Did you tell us awhile ago that when you returned from the Sugar Mill you were attempting to get Bertha Mae into the house and she wouldn't go?

A. No, sir, I didn't say that.

Q. Tell me what happened?

A. When we—as I said, when we got to the house, while we was still in the car, Wayne and I had a drink of whiskey. Had a night cap. We got out of the car, and my wife and I went into the house.

Q. Did you say you had to take her into the house and clean her up? In the bath tub?

A. Not at this time, no, sir.

Q. Later you did? Is that correct?

A. I don't understand the question.

Q. Did you later take Bertha into the bath room and into the bath tub for the purpose of cleaning her up?

A. Later? Yes, sir.

Q. Is that where you pulled all the hair out of her head?

A. I don't remember doing that, sir.

Q. I remember you told us earlier that she tried to snatch away from you?

A. Yes, sir, on the road.

Q. Do you remember the photographs that you saw? Pictures of her?

A. Yes, sir.

Q. Is that what she deserved?

A. No, sir.

Q. You have been a drinking man for some time, haven't you, Mr. Gardner?

A. Yes, sir, I have drank quite a bit.

Q. Drinking is nothing new to you?

A. It is, I'm not a every day drinking man.

Q. It was not uncommon for you to drink either, was it?

A. That quantity, yes, sir.

Q. You tell us that there was no argument between you and Bertha?

A. I said there was no hard argument between me and my wife.

Q. Why in heavens name did you beat her like this?

A. Sir, I don't remember beating her.

MR. KOVACH: Your Honor, I don't believe the defendant testified that he beat her, he only testified that he slapped her with the back of his hand.

MR. GREEN: No further questions.

WHEREUPON, the witness was excused from the witness stand.

MR. GREEN: The state will waive any right to argument on this particular phase of the procedure, your Honor.

MR. KOVACH: May it please the Court, Lady and gentlemen of the jury, you have just heard the second phase of this trial, that is the phase where the evidence is submitted, wherein you are to take this evidence and file with the court advisory recommendation as to whether or not Mr. Gardner is entitled to mercy or the fact that the recommendation be that he be sentenced to death. The court will instruct you on this in a moment. I have only a few things I would like to point out to you. Mr. Gardner, Dan, sat here and he told you all that he could remember. He can't really remember any more apparently. We totalled up twenty-four shots of Vodka, beer that he can recall—that is a prodigious amount of alcohol, I don't care whether the man has been drinking for many years, that is an awfully lot of alcohol. He also testified to you that he had not had one thing to eat, he did say he had a cup of coffee when he first woke up that morning. That is a fantastic amount of alcohol and nothing, nothing, to off set it. That drinking went on from approximately Ten thirty in the morning until when ever he got home, and he still had some whiskey there, had a shot of whiskey at the car, a night cap. Lady and gentlemen of the jury, we would request that you think very seriously about this situation. Dan Gardner says, and he is correct, he has four children. The children need a father. They don't have a mother any more. They need some one there. We would request that you grant mercy in your advisory sentence.

THE COURT: Ladies and gentlemen of the jury, this

trial is divided into two parts. The first part ended with the entry of your verdict. The second part was concerned with the hearing of testimony and evidence for the purpose of insuring the entry of a sentence which will be just in the light of the circumstances. In serving now you act as advisory to the court, the court having the final discretion and responsibility in this matter and the power of independent judgment. Under these procedures it is now your duty to determine by majority vote whether or not you advise the imposition of the death penalty based upon the following circumstances: (1) whether sufficient aggravating circumstances as hereinafter enumerated exist; (2) whether sufficient litigating [sic] circumstances exist as hereinafter enumerated which outweigh the aggravating circumstances found to exist, and (3) based on these considerations whether the defendant should be sentenced to life or death. Aggravating circumstances are limited by statute to the following: (a) the capital felony was committed by a person under sentence of any prison; (b) the defendant was previously convicted of another capital felony or a felony involving the use or threat of violence to a person, (d) the defendant knowingly created a great risk of death to many persons; (d) the capital felony was committed while the defendant was engaged or was an accomplice in the commission of or attempt to commit or flight after committing or attempting to commit any rape, robbery, arson, burglarly, kidnapping, aircraft pirarcy [sic], or the unlawful throwing, placing, or discharging of a destructive device or bomb, (e) the capital felony was committed for the purpose of avoiding or preventing a lawful arrest or effecting escape from custody; (f) the capital felony was committed for pecuniary gain . . . (g) the capital felony was committed to disrupt or hender the lawful exercise of any governmental function or the enforcement of law. Litigating [sic] circumstances by statute are A) the defendant has no significant history or prior criminal activity. B) The capital felony was committed while the defendant was under the infiuence of extreme mental or emotional disturbance; C) The victim was was nsic] participant in the defendant's conduct or consented to the act; D) The defendant was an accomplice in the capital

felony committed by another person and his participation was relatively minor; E) The defendant acted under extreme durress or under the substantial nomination of another person; F) The capacity of the defendant to appreciate the criminality of his conduct or to conform his conduct to a requirement of law was substantially impaired; G) The age of the defendant at the time of the crime; H) The evidence introduced in this second phase of the trial.

Your determination must be made objectively without bias or prejudice to the State or to the defendant. You will be given these instructions to take with you to the jury room. You will also be given two advisory sentences which I will now read to you:

THE COURT: Mr. Green, would you and Mr. Kovach step up here a minute?

(Mr. Green and Mr. Kovach approach bench, discussion at the bench) (Discussion at bench ended)

THE COURT: In reviewing the jury instructions, one of the aggravating circumstances and in fact the aggravating circumstance on which the State presented its evidence was ommitted [sic], and it is as follows: The capital felony was especially heinous, atrocious or cruel, so I will have to add this to these jury instructions which I have just read to you. This will have to be re-typed.

(The Court hands paper to Investigator Keith Owens for deliver [sic] to secretary to be re-typed)

THE COURT: It will take a few moments to re-type this. I will now read you the two forms of advisory sentences. You will take these with you into the jury room, not only the instructions, but also the two forms of advisory sentences. I will read them to you now.

We the jury have heard evidence under the sentencing procedure in the above case as to whether aggravating circumstances were so defined in the court's charge existed in the capital offense here involved and whether sufficient mitigating circumstances as defined in the court's charge to outweigh such aggravating circumstances we find and advise that the aggravating circumstances do outweigh the mitigating circumstances, we therefore advise the court that a death sentence should be imposed herein upon the

defendant by the court, dated this blank day of January 1974, and a place for your foreman to sign.

The other form of the advisory sentence would be, we the jury have heard evidence under the sentencing procedure in the above cause as to whether aggravating circumstances were so defined in the court's charge existed in the capital offense here involved and whether sufficient mitigating circumstances are defined in the court's charge to outweigh such aggravating circumstances and do find and advise that the litigating [sic] circumstances do outweigh the aggravating circumstances, we therefore advise the court that a life sentence should be imposed herein upon the defendant by the court, dated this blank day of January, 1974, and a place for the foreman to sign.

THE COURT: It will take a few moments to re-type that, so if you, Mr. Bailiff, would take the jury to the jury room.

WHEREUPON, the jury was removed from the court room to the jury room.

WHEREUPON, the defendant was taken to the holding room.

THE COURT: Court will be in recess for ten minutes.

WHEREUPON, court was in session after recess: Defendant seated in the court room at defense table.

WHEREUPON, the jury was returned to the jury box.

THE COURT: Members of the jury, I am going to reread the entire jury instructions which have now been corrected. Lady and gentlemen of the jury, this trial is divided into two parts. The first part ended with the entry of your verdict. The second part was concerned with the hearing of testimony and evidence for the purpose of insuring the entry of a sentence which will be just in the light of the circumstances. In serving now, you act as advisors to the court which has the final discretion and responsibility in the matter with power of independent judgment. Under these procedures, it is now your duty to determine by a majority vote whether or not you advise the imposition of the death penalty based upon (1) whether sufficient aggravating circumstances as hereinafter enumerated exist; (2) whether sufficient litigating [sic] circumstances exist as hereinafter

enumerated which outweigh the aggravating circumstances found to exist and (3) based on these considerations whether the defendant should be sentenced to life or death. Aggravating circumstances are limited by statute to the following: (a) the capital felony was committed by a person under sentence of any prison; (b) the defendant was previously convicted of another capital felony, or a felony involving the use or threat of violence to a person; (c) the defendant knowingly created a great risk of death to many persons; (d) the capital felony was committed while the defendant was engaged or was an accomplice in the commission of or attempt to commit or flight after committing or attempting to commit any rape, robbery, arson, burglarly, kidnapping, aircraft pirarcy [sic] or the unlawful throwing, placing, or discharging of a destructive device or bomb; (e) the capital felony was committed for the purpose of avoiding or preventing a lawful arrest or effecting an escape from custody; (f) the capital felony was committed for pecuniary gain; (g) the capital felony was committed to disrupt or hender the lawful exercise of any governmental function or the enforcement of law; (h) the capital felony was especially heinous, atrocious, or cruel. Mitigating circumstances by statute are (a) the defendant has no significant history or prior criminal activity; (b) the capital felony was committed while the defendant was under the influence of extreme mental or emotional disturbance; (c) the victim was [a] participant in the defendant's conduct or consented to the act; (d) the defendant was an accomplice in the capital felony committed by another person and his participation was relatively minor; (e) the defendant acted under extreme durress [sic] or under the substantial nomination of another person; (f) the capacity of the defendant to appreciate the criminality of his conduct or to conform his conduct to the requirement of law was substantially impaired; (g) the age of the defendant at the time of the crime; and (h) the evidence introduced in this second phase of the trial.

Your determination must be made objectively without bias or prejudice to the State or to the defendant. Are there

any additions or corrections to be made to the instructions just given?

MR. GREE: None, your Honor.

MR. KOVACH: No, your Honor.

THE COURT: Mr. Bailiff, will you hand these papers to the foreman with the pictures that were introduced into evidence.

WHEREUPON, the jury was escorted to the jury room, 5:20 P.M.

THE COURT: At this time, for the record, I am going to order a pre-sentence investigation of this defendant.

WHEREUPON, the defendant was escorted to the holding room.

THE COURT: Court will be in recess until the jury returns.

WHEREUPON, court was in session, 5:45 P.M.; defendant seated at defense table; Attorney W.T. Green present for the State, Attorney Michael Kovach present with the defendant;

WHEREUPON the jury was returned to the court room.

THE COURT: Mr. Foreman, have a majority of the jury arrived at an advisory sentence for the Court?

FOREMAN: Yes, sir.

THE COURT: Would you hand it to the bailiff, please?

(Foreman hands paper to the bailiff, bailiff hands paper to the court)

THE COURT: Would you publish the advisory sentence?

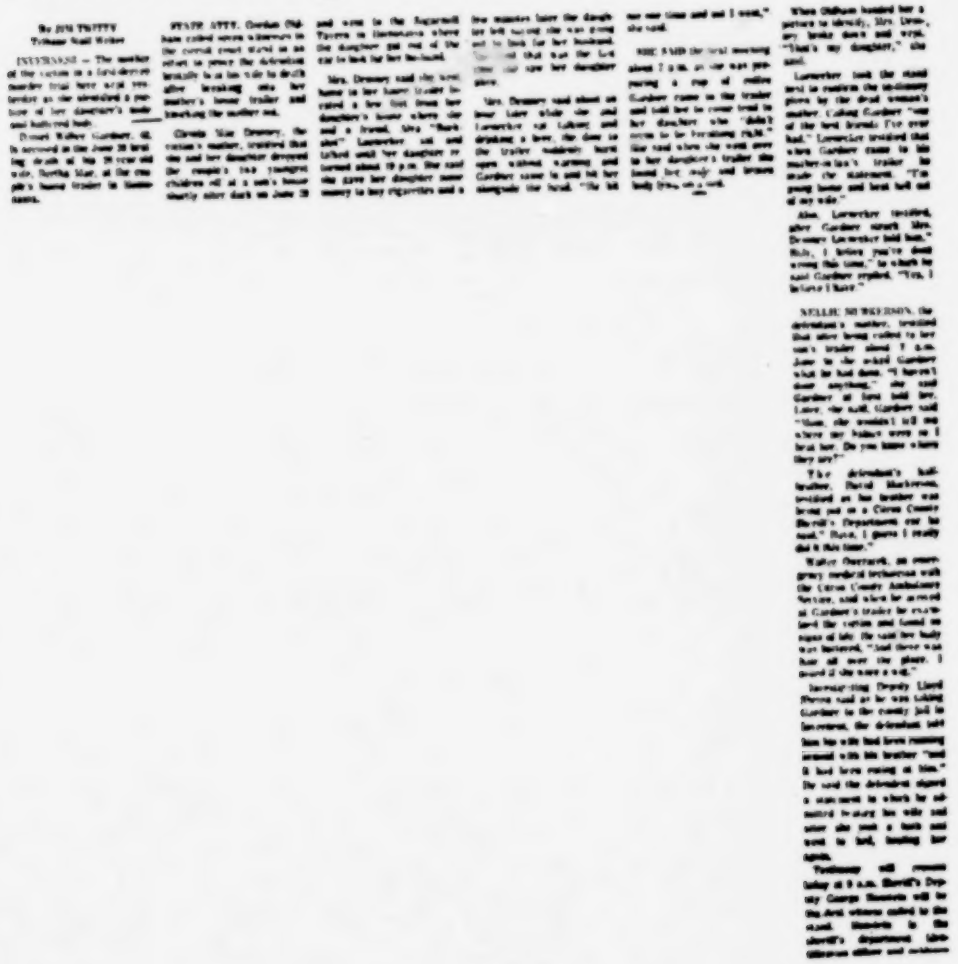
DEPUTY CLERK: In the circuit Court of the Fifth Judicial Circuit of the State of Florida in and for Citrus County, Criminal Case Number 73-132, State of Florida, vs. Daniel Wilber Gardner, Defendant, Advisory Sentence: We the jury have heard evidence under the sentencing procedure in the above cause as to whether aggravating circumstances which were so defined in the court's charge existed in the capital offense herein involved and whether sufficient litigating circumstances are defined in the court's charge to outweigh such aggravating circumstances do find and advise that the litigating [sic] circumstances do outweigh the aggravating circumstances. We therefore advise the court that a life sentence should be imposed herein upon

the defendant by the court. Dated this the 10th day of January, 1974, signed Joseph F. Schoen, foreman.

WHEREUPON, that ended the proceedings.

Testimony Begin In Murder Trial

Mother Weeps Over Victim's Photo



[Verdict]

IN THE CIRCUIT COURT OF THE FIFTH JUDICIAL CIRCUIT OF THE STATE OF FLORIDA, IN AND FOR CITRUS COUNTY

Criminal Case No. 73-132-CA-01

STATE OF FLORIDA

vs.

DANIEL WILBUR GARDNER,

Defendant,

VERDICT

We the Jury, find the Defendant DANIEL WILBUR GARDNER, Guilty as charged in the Indictment of Murder in the First Degree.

So say we all.

Dated this the 10th day of January, 1974.

/S/ JOSEPH F. SCHOEN
Foreman of Jury

[Order for Pre-Sentence Investigation]

FORM J-2

IN THE CIRCUIT COURT OF THE FIFTH JUDICIAL CIRCUIT OF FLORIDA,
IN AND FOR Citrus COUNTY.
CRIMINAL CASE NO. 72-132CF-4-A

Charles Fitzpatrick Asst Public Defender

Now, on this day, came in person the above-named defendant, with his counsel, Leonard Rubinstein into open court, and entered his plea of not guilty to the charge of Murder in the First Degree as defined by Section 782.04 of the Florida Statutes; and thereupon said defendant was duly tried by a jury, with his attorney representing him at such trial, and the jury having brought in its verdict finding the defendant guilty of the crime of Murder in the First Degree;

The court adjudges him to be guilty of the crime of Murder in the First Degree.

IT IS, THEREFORE, CONSIDERED, ORDERED AND ADJUDGED that the Probation & Parole Supervisor of District 8 of the State of Florida be and he is hereby directed to make pre-sentence investigation in the above cause and to report the result of such investigation to this court, and that the imposition of sentence in this cause be suspended pending the receipt by the court of such report.

DONE AND ORDERED in open court at Inverness, Citrus County, Florida, this 10th day of January, A. D. 19 74

John W. Bryant
Circuit Judge

[Advisory Jury Sentence]

IN THE CIRCUIT COURT OF THE FIFTH JUDICIAL CIRCUIT OF THE STATE OF FLORIDA, IN AND FOR CITRUS COUNTY

CRIMINAL CASE NO. 73-132

STATE OF FLORIDA,

vs.

DANIEL WILBER GARDNER,

defendant.

ADVISORY SENTENCE

We, the Jury, have heard evidence, under the sentencing procedure in the above cause, as to whether aggravating circumstances which were so defined in the Court's charge, existed in the capital offense here involved, and whether sufficient mitigating circumstances are defined in the Court's charge to outweigh such aggravating circumstances, do find and advise that the mitigating circumstances do outweigh the aggravating circumstances.

We therefore advise the Court that *a life* sentence should be imposed herein upon the defendant by the Court.

Dated this 10th day of January, 1974.

/S/ JOSEPH F. SCHOEN
FOREMAN

[Petitioner's Motion for a New Trial, January 22, 1974]

MOTION FOR A NEW TRIAL

Comes now Defendant, Daniel Wilbur Gardner, by and through his undersigned attorney, and moves this Court to grant him a new trial in that the Defendant feels that his motions for a directed verdict were improperly denied by this Court in that the State wholly and utterly failed to present sufficient evidence to prove beyond and to the exclusion of a reasonable doubt that the Defendant did with premeditated design murder his wife, Bertha Mae Gardner.

[Pre-Sentence Investigation Report (Non-confidential Portion).]*

FLORIDA PAROLE AND PROBATION COMMISSION

Presentence Investigation

Court - Circuit	County - Citrus
Name Daniel Wilbur Gardner	Docket # 73-132
	District 42 Case # 641
Address Route 1, Box 35, Homosassa,Fla.	Offense - Murder in the 1st Digree [sic]
Age 39 DOB 2-9-34 RACE/SEX W/M	Date of adjudication
	Date of adjudication W/held
Marital Status Widower	Arrest Date 6-30-73
Legal Residence Citrus County - 2 years	Amount of Bond Release date
Social Security #	Days in Jail Since Arrest
	Arresting Agency S.O. Citrus County
Judge J.W. Booth	
Prosecutor W. T. Green	
Defense Atty Kovacs	
Disposition Guilty by Jury as charged 1-10-74	

I. OFFENSE - Information resume:

a) Information Resume: Information #73-132 charged that Daniel Wilbur Gardner did on 6-30-73, did in a premeditated design kill his wife, Bertha Mae Gardner.

b) Court Appearances: The subject on 1-7-74, went to trial on Murder in the 1st Degree and was found guilty by a jury on 1-10-74 for 1st Degree Murder and they also recommended mercy in this case.

* This portion of the Pre-Sentence Investigation Report appears at pages 8-10 of the Supplement to Transcript of Record in the Supreme Court of Florida.

c) Co-Defendant Status: None.

d) Circumstances: Investigation reveals that on 6-30-73, at approximately 7:00 S.O. Citrus County received a call to the Gardner residence in Homosassa to investigate a death. Deputy Shelton arrived on the scene to discover the nude body of Bertha Mae Gardner lying on the bed in one of the bedrooms. His observation was that the victim had bruises, contusions, cuts on her legs and cuts around her pubic area. The victim appeared to have been severly [sic] beat on and had bleed [sic] profusely from her vagina. Her hair had been pulled from head in such a large quantity, that it appeared that she had been partially scalped. In attempting to find out, what happened, Deputy Shelton from several sources compiled the following information.

On 6-29-73, the subject left the home around 10:00 A.M. supposedly to go out and drink. He apparently continued drinking until late that night, most of the drinking being done in and around the Sugar Mill Tavern in Homosassa. Later that night the subjects wife, also the victim in this case, came to the Sugar Mill tavern and apparently started to argue with the subject over where he had been all day. From all indications this arguing continued when the subject and his wife went home. Several witnesses stated that both the subject and his wife were under the influence of alcohol. During the trial, several witnesses testified to the fact that the subject apparently had a drag out [sic] argument that ended in his mother in laws trailer next door and continued when he returned his wife to their trailer. During the night, noises were head [sic] comeing [sic] from the trailer, but no one cared to investigate what was happening. From all indications the subject apparently administered a severe beating to his wife which resulted in her death.

e) Defendant's Statement: Subject stated that he had been drinking practically all day on the 29th at the sugar mill, stated that his wife came in later that night and she apparently had been drinking. He stated that they both went home in the company of some people at the sugar mill and had an argument about where the kids were, stating he went next door to his mother in laws to see where his children were, and apparently broked [sic] down the door. He stated his wife came after him naked and he tried to get her home and she fell down stating he finally got her into the trailer and tried to wash her off because she had fell in the dirt. He stated then he apparently lost his sense of where he was at and he apparently went to sleep in the next thing he got up he saw her lying in the bed. He stated he figured she was hurt and he tried to give mouth to mouth resisitation and this failed and he apparently got hold of his mother in law next door who finally called the police. The subject kept saying over and over again he does not remember ever attempting to hit his wife, doesn't remember what happened until he woke up in the morning.

PRE-SENTENCE INVESTIGATION
PAGE 2 - DANIEL WILBUR GARDNER

II. PRIOR ARRESTS & CONVICTIONS: A check of local law enforcement authorities and the FBI reveal the following:

Place	Date	Charge	Disposition
P.D. Jacksonville,Fla.	5-5-52	Disorderly Conduct & Fighting	Fine $25
P.D. Jacksonville, Fla.	6-1-52	Vagrancy	Dismissed
Air Force Inlisted	9-26-52	Inlistment	
S.O. Jacksonville,Fla.	10-25-56	Malice Miscnief	No dis. shown
P.D. Jacksonville,Fla.	11-6-65	Disorderly Conduct (Drunk)	Fine $10
P.D. Tampa, Florida	6-27-58	Drunk	Fine $15
S.O. Ft. Myers,Fla.	7-20-60	Investigation of Aggravated Assault	Released
S.O. Inverness,Fla.	1-3-68	Assault WITC Murder	Nolle Prossed 8-26-68
S.O. Inverness, Fla.	10-26-68	Worthless Check($25)	Restitution + Court Cost
S.O. Inverness, Fla.	1-10-69	Disorderly Conduct	$30 fine
S.O. Inverness, Fla.	4-2-70	Assault & Battery	Dismissed
S.O. Inverness, Fla.	4-21-72	Assault & Battery	Dismissed

a) Detainers: None

III. PERSONAL HISTORY:

a) Family:

Parents: Father, William G. Gardner, age 36, deceased. Mother, Nellie Murkerson, age 58, occupation housewife. Step father is Ernest Murkerson.

Siblings:
Brothers:

Name	Age	Residence	Occupation
Mr. Gardner	46	Bradon	Comm. Fisherman
David Murkerson	37	Homosassa	Carpet
Davie Murkerson	33	Homosassa	Carpet

Sisters:

Voncille Gardner 27 Deceased

Defendant: The above 39 year dold white male was born 2-9-34 to the above parents in Homosassa, Florida.

b) Education: Subject left school at age 15 completing the 8th grade at Southside Grade School, Jacksonville, Florida. Subject states he was a fair student.

c) Marital Status: The subject has been married twice, first to one Jo Ann A. Youdal, which he married in1958 in Jacksonville, Florida. Subject stated that no children were born to this union and they just couldn't get along. Subject stated he divorced his first wife in Citrus County in 1966.

The subject then married one Bertha Mae Hutchinson, the victim in this case, in Homosassa, Florida, in 1968. Born to this union are 4 children. Subject stated that he had a fairly good relationship with his second wife. He stated that their main trouble was her mother, who was always butting into their affairs and causing trouble between him and his wife. He did stated that both of them drank and this was probably some of their troubles.

d) Residence: The subject has resided most of his life in the Homosassa Area, and at the time of the incident he was residing in a trailer, which was a three bedroom in Old Homosassa, Florida.

e) Religion: The subject states he was the protestant faith. He states he is a poor member of that or any church.

f) Interests & Activities: Subject states that his leisure hours are spent mostly at home with his family.

PRE-SENTENCE INVESTIGATION
PAGE 3-DANIEL WILBUR GARDNER

he subject states that he would consider himself a heavy beer drinker and that e has never been involved with any drugs at all.

g) Military: Yes
How entered: Enlisted Date: 9-26-52 Branch: Air Force
Highest Rank: Airman 1st Class
Duties: Crafts
Court Martials: None
Discharge Date: 9-27-56 Type: General Discharge under honorable conditions.

h) Health: The subject states that he is in good condition at the present time and has no problems.

i) Employment: Subject stated at the time of this incidence he was unemployed for approximately two months, but he did get money by doing odd jobs of carpentry around Homosassa. Prior to this he worked for Florida Power Corporation on and off for the past five years, as a carpenter.

j) Economic Status: The subject claims no assets and no liabilities.

IV. COURT OFFICIALS STATEMENTS: Prosecuting Attorney, Trewick Green states he remembers the case, said the subject had a fair trial and he will rely on the information revealed by the PSI.

Defense Attorney, Public Defender Kovacs, stated he has previously entered a plea for mercy for the subject and he also noted that the jury also entered a plea for mercy for the subject. He stated he will go by this plea.

Law enforcement authorities are quite strong in their opinion of the subject, they consider the subject a menace to society. They feel he should not be let to roam the streets for what he didto his wife. They stated that the subject had a long line of assault charges on his wife, that should be taken into count about this subject.

V. PLAN: Should Probation be the decision of the Court, the subject stated he will continue residing with his trailer in Homosassa in order to make a home for his children, and stated he will surely be able to find employment.

Respectfully submitted,

Michael C.Dippolito,
District Supervisor

MCD/kb
1-28-74

[Trial Court's Findings of Fact]

IN THE CIRCUIT COURT OF THE FIFTH
JUDICIAL CIRCUIT OF FLORIDA,
IN AND FOR CITRUS COUNTY.

CRIMINAL CASE NO. 73-132

STATE OF FLORIDA,

vs.

DANIEL WILBUR GARDNER,

Defendant.

FINDINGS OF FACT

THIS CAUSE coming on this day to be considered pursuant to the provisions of Section 921.141, Florida Statutes, as amended by Chapter 72-724, Laws of Florida, after (1) the conviction of the defendant, Daniel Wilbur Gardner, of Murder in the First Degree, by a duly impaneled jury and his adjudication of guilt of such offense, (2) the rendition by such jury at the conclusion of the sentencing proceeding of an Advisory Sentence recommending the imposition of a life sentence, (3) the receipt of a pre-sentence investigative report on said defendant by the undersigned and receipt by the State and defendant's attorney of a copy of that portion thereof to which they are entitled, and after carefully considering and weighing the evidence presented during such trial and sentencing proceeding, the arguments' of the attorneys as to the sentence to be imposed and reviewing the factual information contained in said pre-sentence investigation, the undersigned concludes and determines that aggravating circumstances exist, to-wit: The capital felony was especially heinous, atrocious or cruel; and that such aggravating circumstances outweighs the mitigating circumstance, to-wit: none; and based upon the records of such trial and sentencing proceedings makes the following findings of facts, to-wit:

1. That the victim died as a result of especially heinous, atrocious and cruel acts committed by the defendant, the nature and extent of which are reflected by the testimony of Dr. William H. Shutze, District Medical Examiner of the Fifth Judicial Circuit of the State of Florida, as follows:

(a) At least one hundred bruises upon her head, both eyes, nose, abdomen, arms, both breasts, chest, back, thighs and legs.

(b) Large patches of healthy hair pulled from her head as a result of her hair being grabbed, leaving bald spots.

(c) Abrasions, bruises and contusions to the head as a result of her hair being grabbed and her head pushed against the wall or floor.

(d) Massive hemorrhage of the scalp, small hemorrhages under the covering of the brain, and contusions of the nose.

(e) Massive hemorrhage of the pubic area, including the inner surfaces of the thigh and the labia of the vulva.

(f) Bruised and swollen external genitalia.

(g) Hemorrhage in and around the right adrenal gland and right kidney.

(h) A large laceration on the perineum extending from the posterior part of the vagina toward the anus.

(i) Large tears inside the vagina from the outside entrance all the way to the back as far as it could go, caused by a broom stick, bat or bottle.

(j) A large laceration or tear of the entire right side of the liver.

(k) The peritoneal cavity or bone located in the pubic area in the lower part of the body, was broken up into small pieces by blunt injury such as being stomped on.

and based thereon concludes that the death sentence should be imposed upon said defendant.

Dated this 30th day of January, 1974.

/S/ JOHN W. BOOTH
Circuit Judge

[Judgment and Sentence]

IN THE CIRCUIT COURT OF THE FIFTH
JUDICIAL CIRCUIT OF FLORIDA,
IN AND FOR CITRUS COUNTY.

CRIMINAL CASE NO. 73-132

STATE OF FLORIDA,

vs.

DANIEL WILBUR GARDNER,

Defendant.

JUDGMENT AND SENTENCE

The above named defendant, with his counsel, Charles B. Fitzpatrick, Assistant Public Defender heretofore entered his plea of not guilty to the charge of Murder in the First Degree as defined by Section 782.04, as amended, of the Florida Statutes; and thereupon said defendant was duly tried by a jury, with his attorney representing him at such trial; and the jury having brought in its Verdict finding the defendant guilty of Murder in the First Degree; and rendered its Advisory Verdict; and the Court having adjudicated said defendant guilty of said offense and filed its Findings of Fact herein.

And the defendant being asked by the court whether he had anything to say why sentence of the law should not now be pronounced upon him, and saying nothing to preclude such sentence; it is, therefore,

The JUDGMENT, ORDER AND SENTENCE of the court that he be electrocuted til dead in the manner directed by the laws of the State of Florida.

DONE AND ORDERED in open court at Inverness, Citrus County, Florida, this 30th day of January, 1974.

/S/ JOHN W. BOOTH
Circuit Judge

[Petitioner's Motion for a New Trial, February 5, 1974.]

MOTION FOR A NEW TRIAL

Comes now the Defendant, Daniel Wilbur Gardner, by and through his undersigned attorney, and moves this Court for a new trial, and alleges that prejudicial error occurred as follows:

1. That under the Supreme Court's ruling in *Witherspoon vs. Illinois*, 389 U.S. 1035, 88 S.Ct. 793, 19 L.Ed.822, the Supreme Court ruled that in a non-bifurcated trial, the prosecutor could be allowed to ask whether or not a juror would ever consider imposing the death penalty.

2. That subsequent to the enactment of Florida Session Law 72-724, Florida Statute 921.141 provides for two (2) deliberations by a Florida jury—one to consider guilt or innocence, and subsequent deliberation to consider mercy or no mercy.

3. That any questions asked by the prosecutor relating to whether or not a juror would ever consider capital punishment in no way relates to, is not reasonably related to nor relevant to a decision on the defendant's guilt or innocence and an answer by a juror that the juror could not consider the death penalty would not in any way affect the ability of the juror to participate fully and freely in deliberations on the questions of innocence or guilt.

4. That in allowing the prosecutor to ask Witherspoon-type questions and to be granted challenges for cause on the basis that the juror could not consider the death penalty unduly prejudices the defendant's right to a fair trial, in violation of his right to a fair and impartial jury trial and to due process in violation of the Fifth and Sixth and Fourteenth Amendments to the United States Constitution and Article I, Sections 9, 16 and 22 of the Florida State Constitution.

5. That the Grand Jury which indicted the Defendant was composed of persons between the ages of eighteen (18) to twenty-one (21) in contravention of Florida Statute 40.01.

6. That the Grand Jury proceedings were not reported

by a qualified Court Reporter, and no record of these proceedings exists or can be constructed. The inability to produce a record of the Grand Jury proceedings prevents the Defendant from inquiring into possible inconsistent statements by witnesses beforethe Grand Jury. Chapter 40, Florida Statutes, sets out qualifications of persons who can sit as Grand Jurors, yet without a record of the secret proceedings there is no method to review the procedure. The absence of a record denies to the Defendant the effective assistance of counsel as guaranteed to him in the Sixth Amendment to the United States Constitution, and in Article I, Section 16, of the Florida State Constitution, and violates his right to be informed of the charges against him in contravention of the Fifth and Fourteenth Amendments to the United States Constitution, and Article I, Section 16, of the Florida State Constitution; and impedes his access to the Courts and his right to confront witnesses against him, in violation of the Fifth, Sixth and Fourteenth Amendments to the United States Constitution, and Article I, Section 16 and 21 of the Florida State Constitution.

7. That Florida Statute, Section 782.04 and 921.141 are unconstitutionally vague in violation of the due process and equal protection guaranteed to the Defendant by the Fifth and Fourteenth Amendments to the Constitution of the United States, and Article I, Section 16 of the Florida State Constitution, because a Grand Jury, when called to consider bringing an Indictment, would be unable to distinguish the language between murder in the first degree and murder in the second degree, therefore, the Indictment for murder was unconstitutionally discretionary in application.

8. That Florida Statute 782.04 is unconstitutionally vague in violation of the due process and equal protection guaranteed to the Defendant by the Fifth and Fourteenth Amendments to the United States Constitution, and Article I, Section 2 and 9 of the Florida State Constitution, because the trial judge cannot determine what specific crimes are embodied within the divisions of murder in the first degree and murder in the second degree, in order to properly instruct the jury and conduct a trial.

9. That Florida Statutes 782.04, 775.082 and 921.141 provide for:

a. Cruel and/or unusual punishment in violation of the Eighth and Fourteenth Amendments to the United States Constitution and Article I, Section 17 of the Florida State Constitution.

b. Arbitrary infliction of punishment so as to deprive the defendant of life, liberty or property without due process or equal protection of law, in violation of the Fifth and Fourteenth Amendments to the United States Constitution, and Article I, Sections 9 and 16 of the Florida State Constitution.

c. Insufficient and arbitrary standards which are vague, indefinite and uncertain so as to be contrary to the Fifth, Sixth and Fourteenth Amendments to the United States Constitution, and Article I, Sections 9 and 16 of the Florida State Constitution.

d. Vague, ambiguous and indefinite provisions so as to deprive the defendant of his right to know the nature of the charges, the differentiation between the degrees of homicide, and to be able to prepare a defense accordingly, in violation of the Fifth, Sixth and Fourteenth Amendments to the United States Constitution, and Article I, Sections 2, 9 and 16 of the Florida State Constitution.

10. That Florida Statute 921.141 placed upon the defendant the burden of proving mitigating circumstances in violation of his rights against self-incrimination as provided in the Fifth and Fourteenth Amendments to the United States Constitution, and Article I, Sections 2 and 9 of the Florida State Constitution.

11. That the use of the death penalty pursuant to Florida Statute 921.141 by the State of Florida, contravenes the Supreme Court's decision in *Furman vs. Ga.*, 408 U.S. 238, 33 L.Ed.2d 346, 92 S.Ct.2726(1972).

12. That Florida Statute 775.082, in requiring a defendant convicted of first degree murder and sentenced to life imprisonment to serve twenty-five (25) calendar years is a violation of due process and equal protection of the law as guaranteed to the defendant in the Fifth and Fourteenth Amendments to the United States Constitution, and Article

I, Sections 2 and 9 of the Florida State Constitution, and that the punishment bears no rational relationship whatsoever to the defendant's acts or background, and cannot be justified to serve any recognized penalogical purpose.

13. That the use of the death penalty is cruel and/or unusual punishment in violation of the Eighth Amendment to the United States Constitution, and Article I, Section 17 of the Florida State Constitution.

14. That even if the death penalty is held to be constitutional, death by electrocution as provided in Florida Statute 922.10 is cruel and/or unusual punishment in violation of the Eighth Amendment to the United States Constitution, and Article I, Section 17, of the Florida State Constitution.

15. That Florida Statute 921.141 violates the defendant's right to due process and equal protection guaranteed to him in the Fifth and Fourteenth Amendments to the United States Constitution and Article I, Section 2 and 9 of the Florida State Constitution, in that only persons convicted or adjudicated guilty of a capital crime may have evidence introduced that "the court deems to have probative value . . . regardless of its admissability under the exclusionary rules of evidence . . . ".

16. That Florida Statute 921.141 is unconstitutionally vague, denies effective appellate review of the defendant's sentence, and violates the due process and equal protection guaranteed to the defendant by the Fifth and Fourteenth Amendments to the United States Constitution, and Article I, Section 2 and 9 of the Florida State Constitution, in that there is an absence of standards.

17. That Florida Statute 921.141 provides for arbitrary and discretionary exercise of the state's police power in circumstances where the arbitrary and discretionary exercise is not reasonably related to a valid state purpose, in violation of the Fifth and Fourteenth Amendments to the United States Constitution, and Article I, Section 9 of the Florida State Constitution.

18. That the absence of any sufficient non-vague standards on aggravation or mitigation in Florida Statute 921.141 violates the due process guaranteed to the defendant in the Fifth and Fourteenth Amendments to the United

States Constitution, and Article I, Section 9 of the Florida State Constitution, in that it is impossible for the trial judge to instruct the jury in a manner that is not discretionary since the designated circumstances of aggravation and mitigation are vague, incomplete and indefinite.

19. That the circumstances to be considered in mitigation under Florida Statute 921.141, are inadequate, discretionary, arbitrary, insufficient and vague, in violation of the due process and equal protection clauses in the Fifth and Fourteenth Amendments to the United States Constitution, and Article I, Sections 2 and 9 of the Florida State Constitution, in that omitted by statute from consideration, and by necessity omitted from the judge's instructions to the jury, are mitigating circumstances, including: the defendant's military history, the defendant's honorable conduct or bravery, the defendant's motive (if appropriate), the defendant's family and it's needs, the defendant's prior suffering from other than mental conditions, the defendant's prior or subsequent moral convictions and behavior, that the death of a victim was a circumstance of chance, rather than a design of the defendant, that the defendant averted injury or exposure of injury to potential victims, that the defendant turned himself in and confessed, that the capital felony was not committed for pecuniary gain, the nature and character of the victim, and that the victim provoked or encouraged the acts of the defendant.

20. That, by limiting the circumstances in mitigation as delineated in Florida Statute 921.141, the Statute provides for cruel and unusual punishment in violation of the Eighth and Fourteenth Amendments of the United States Constitution, and Article I, Section 17 of the Florida State Constitution.

21. That Florida Statute 921.141, in allowing the judge to overrule the jury's verdict of mercy violates the defendant's right to a trial by jury as guaranteed in the Sixth Amendment to the United States Constitution, and Article I, Sections 16 and 22 of the Florida State Constitution.

22. It was a reversible error and a play for the sympathy of the jury to permit the identification of the victim of a

crime by a member of the deceaseds family where other witnesses were available,

Furr vs. State 229 S2d 269 (Fla. App. 1969)

and the State clearly committed such error and evoked such sympathy in asking Glenda Mae Demeny to identify a photo of the deceased, Bertha Mae Gardner.

23. As to the photograph submitted into evidence by the State allegedly displaying hair of the deceased, the court erred in allowing this into evidence in that the witness, Deputy Shelton, had to be called upon by the State to explain to the jury the significance of the photograph, to wit: the dark spots in the picture are clumps of the deceased's hair. In order for any photograph to be admissable at all, it must be *clear* that it expresses pictorially what the witness would otherwise be called upon to describe as the result of his perception.

S. Gard, Florida Evidence 336 Authentication of Photographs (5th ed. 1967).

24. That the photograph submitted by the State by which they identified the deceased was inadmissable in that "indecent exposures are not permitted,"

Id. §243, Exhibition of Injuries in Court

and the photograph was a full length nude photograph and not used to display injuries thereon.

25. The State wholly and utterly failed to prove the elements of the Corpus Delicti beyond and to the exclusion of a reasonable doubt in that the State failed to prove that the criminal agency of the defendant to be the perpetrator of harm to the deceased

Sciortino v. State 115 S2d 93 (2dDCA, 1959)

A. The State failed to place the defendant in the same building or area at the time of the death of Bertha Mae Gardner.

B. The State failed to prove premeditation as is required in a case of first degree murder by any means other than a statement allegedly made to the investigating officer, which is unsupported by any of the evidence, the morning after the death of Bertha Mae Gardner, at a time when the defendant was possibly ill with grief over the loss

of his wife and extremely hungover, from excessive alcohol intake the day and night before.

C. The only two State witnesses who placed the defendant near the scene of Bertha Mae Gardner's death were her mother and her mothers boyfriend, Buckshot Leonecker, and their testimony was obviously prejudicial to defendant and yet obviously incompetent in that they were both caught in lies on the stand and the Court erred in failing to strike all of their testimony.

D. The State alleged circumstantial evidence in proving up the Corpus Delicti, but failed to follow the guidelines set out in *Lee vs. State* 117 So699 (Fla. 1928), *Freeman vs. State*, 101 S2d 887 (2d. DCA, 1958) which states that "When such circumstantial evidence is resorted to the proof must be convincing, satisfactory and unequivocal in such a degree as is compatible with the nature of the case beyond a reasonable doubt."

E. Even though the fact of premeditation is a question for the jury, the jury may not assume premeditation arising from the fact of a killing or homicide, *Newton vs. State*, 21 Fla. 53 (1884), and this is an element of the offense which must be proven beyond a reasonable doubt just as any other element of a crime, *Snipes vs. State*, 17 S2d. 93 (Fla.1962).

F. The State wholly failed to prove the defendant had any conscious appreciation of the intent to kill, the nature of the act for which he was charged or the probable result, *Mackiewicz vs. State*, 114 S2d.684(Fla. 1959).

26. The Court erred in admitting the testimony of the Medical Examiner in that he had acquired no positive identification of the alleged victim about whom he testified.

27. The Court erred in failing to call this case a mistrial in that the State presented extensive evidenciary exhibits and did not even attempt to place them in evidence but proffered them for view and probative value for the jury and in this manner avoided any rebuttal as to the weight to be placed on said probative value by the defense.

WHEREFORE, defendant moves this Honorable Court to grant him a new trial and to further rule that the new trial be treated as a non-capital case and tried before a six-man jury.

[Order Appointing Counsel for Appeal]

IN THE CIRCUIT COURT, IN AND FOR
CITRUS COUNTY, FLORIDA.

CASE NO. 73-132-CF-A-01

STATE OF FLORIDA,
Plaintiff,

vs.

DANIEL WILBUR GARDNER,
Defendant.

ORDER APPOINTING COUNSEL

This cause having come on for hearing, and it appearing that the defendant is insolvent and without funds to pursue an appeal, and the court being duly advised in the premises, it is hereby

ORDERED AND ADJUDGED that the office of the Public Defender of the Twelfth Judicial Circuit of Florida be, and is hereby appointed to aid and assist defendant in the preparation and presentation of defendant's appeal in this cause, and it is further

ORDERED AND ADJUDGED that all necessary costs of the appeal in this cause will be borne by Citrus County.

DONE AND ORDERED in Chambers this 20th day of February, 1974.

/S/ CIRCUIT JUDGE

[Petitioner's Assignments of Error, filed April 5, 1974, in the Circuit Court, in and for Citrus County, Florida.]

". . . . 12. The court erred in rendering its findings of fact in support of the death penalty because the court considered factors not based upon the record of the trial and the sentencing proceedings in contravention of Fla. Stat. §921.141(3).

13. The court erred in considering the presentence investigation of defendant . . . ."

[Opinion of the Supreme Court of Florida
131 So.2d 675 (Fla. 1975).]

DANIEL WILBUR GARDNER, *Appellant,*

vs.

STATE OF FLORIDA, *Appellee.*

No. 45106.

SUPREME COURT OF FLORIDA.

Feb. 26, 1975.

PER CURIAM.

This cause is before us on direct appeal from a conviction of murder in the first degree, and a sentence of death imposed upon appellant in the Circuit Court in and for Citrus County. We have jurisdiction pursuant to Article V, Section 3(b)(1), Constitution of Florida (1973).

On August 22, 1973, the Grand Jury of Citrus County returned an indictment against defendant charging him with first degree murder in that he on June 30, 1973, in Citrus County did unlawfully and from a premeditated design kill Bertha Mae Gardner, a human being, by striking her with a blunt instrument and did inflict in and upon the body of Bertha Mae Gardner a mortal wound from which she died.

After trial, the jury returned a verdict of guilty as charged in the indictment. After a post-conviction sentence advisory hearing, the jury returned an advisory sentence recommending that a life sentence be imposed. The trial judge adjudicated defendant guilty. After carefully considering and weighing all the evidence presented during the trial and sentencing proceedings, the trial judge, pursuant to the safeguards afforded by Section 921.141, Florida Statutes, entered written detailed findings of fact in support of the death penalty specifically stating as follows:

"[T]he undersigned concludes and determines that aggravating circumstances exist, to-wit: The capital felony was especially heinous, atrocious or cruel; and that such aggravating circumstances outweighs the mitigating circumstance, to-wit: none; and based upon the records of such trial and sentencing proceedings makes the following findings of facts, to-wit:

"1. That the victim died as a result of especially heinous, atrocious and cruel acts committed by the defendant, the nature and extent of which are reflected by the testimony of Dr. William H. Shutze, District Medical Examiner of the Fifth Judicial Circuit of the State of Florida, as follows:

"(a) At least one hundred bruises upon her head, both eyes, nose, abdomen, arms, both breasts, chest, back, thighs and legs.

"(b) Large patches of healthy hair pulled from her head as a result of her hair being grabbed, leaving bald spots.

"(c) Abrasions, bruises and contusions to the head as a result of her hair being grabbed and her head pushed against the wall or floor.

"(d) Massive hemorrhage of the scalp, small hemorrhages under the covering of the brain, and contusions of the nose.

"(e) Massive hemorrhage of the pubic area, including the inner surfaces of the thigh and the labia of the vulva.

"(f) Bruised and swollen external genitalia.

"(g) Hemorrhage in and around the right adrenal gland and right kidney.

"(h) A large laceration on the perineum extending from the posterior part of the vagina toward the anus.

"(i) Large tears inside the vagina from the outside entrance all the way to the back as far as it could go, caused by a broom stick, bat or bottle.

"(j) A large laceration or tear of the entire right side of the liver.

"(k) The peritoneal cavity or bone located in the pubic area in the lower part of the body, was broken up

into small pieces by blunt injury such as being stomped on.

and based thereon concludes that the death sentence should be imposed upon said defendant."

We have listened carefully to oral arguments, examined and considered the record in light of the assignments of error and briefs filed and we have also, pursuant to Rule 6.16(b), Florida Appellate Rules, reviewed the evidence to determine whether the interests of justice require a new trial, with the result that we find no reversible error is made to appear and the evidence in the record before us does not reveal that the ends of justice require that a new trial be awarded.

Upon considering all the mitigating and aggravating circumstances and careful review of the entire record in the cause, the trial court imposed the death penalty for the commission of the afore-described atrocious and heinous crime.

Accordingly, the judgment and sentence of the Circuit Court are hereby affirmed.

It is so ordered.

ADKINS, C. J. and ROBERTS, McCAIN, DEKLE and OVERTON, JJ., concur.

ERVIN (Retired), J., concurs in part and dissents in part with opinion with which BOYD, J., concurs.

ERVIN (Retired), Justice (concurring in part, and dissenting in part):

Appellant attacks the constitutionality of the death penalty as re-enacted in Florida in the wake of Furman v. Georgia, 408 U. S. 238, 92 S.Ct. 2726, 33 L.Ed.2d 346 (1972), a decision whose ultimate impact remains to be seen. As previously expressed in my dissenting opinions in State v. Dixon (Fla.1973), 283 So.2d 1, and Spinkellink v. State, 313 S.2d 666, I have weighed Florida's new death penalty statutes, Sections 921.141, 782.04, and 775.082,

F.S., in the light of *Furman* and I find them constitutionally wanting.

My views of our present death penalty statutes are no less strong in this case than in those previously decided or yet to be decided thereunder; however, for fear of being unduly repetitious with the same futility as before, I forego revisiting the constitutionality issue but hold the belief that ultimately higher judicial authority will find the statutes unconstitutional prior to execution of this and other death sentences similarly imposed.

As required by Rule 6.16(b), F.A.R., I have reviewed the record below in its entirety and, notwithstanding my position with respect to the constitutionality of our death penalty statutes, I am compelled to conclude that Appellant's sentence should be commuted by this Court to life imprisonment on other grounds. The essential facts of the case are not disputed by the parties; however, they take issue with their application in determining Appellant's sentence.

Appellant first contends the trial judge erred in considering a presentence investigation report containing matter not properly admissible as aggravating circumstances specified in Section 921.141(6).[1] The record shows that prior to imposing sentence upon Appellant the trial judge ordered a presentence investigation report pursuant to Rule 3.710, Cr.P.R. Appellant argues that in considering the PSI report the trial judge vitiated the sentence by taking the process out of the bounds of Section 921.141, more specifically that Section 921.141 limits the judge to consideration of the aggravating circumstances therein enumerated and that the PSI report included matters which were detrimental to Appellant yet were not among the aggravating circumstances in the statute.

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[1] I note that Chapter 72-724, Laws of Florida, amending § 921.141, F.S., provided for 7 subsections including (6) Aggravating circumstances and (7) Mitigating circumstances. However, § 921.141., F.S. (1973), contains only 6 subsections including (5) Aggravating circumstances and (6) Mitigating circumstances, but retains references in subsections (1) and (3)(b) to subsections (6) Aggravating circumstances and (7) Mitigating circumstances. References thereto in my opinion assume the correctness of Chapter 72-724 and the incorrectness of § 921.141 as printed.

Appellant attacks the portions of the PSI report pertaining to prior arrests and convictions and court officials' statements. The prior arrests and convictions section included arrests over a ten-year period, none of which resulted in a conviction "of another capital felony or of a felony involving the use or threat of violence to the person," an aggravating circumstance provided in Section 921.141(6)(b). The court officials' statements sections contained the following entry:

> "Law enforcement authorities are quite strong in their opinion of the subject, they consider the subject a menace to society. They feel he should not be let to roam the streets for what he did to his wife. They stated that the subject had a long of line of assault charges on his wife, that should be taken into count [sic] about this subject."

Neither is such opinion one of the aggravating circumstances specified in Section 921.141(6).

While questioning the admissibility of such matters for purposes of sentencing, I recognize the statute provides that:

> "[E]vidence may be presented as to any matter that the court deems relevant to sentence, and shall include matters relating to any of the aggravating or mitigating circumstances enumerated in subsections (6) and (7) of this section."

It is, however, logically inconsistent to allow the trial judge to consider such extraneous matters as those related above which are clearly not aggravating or mitigating circumstances expressly enumerated in the statute, in effect reintroducing the element of discretion in the trial judge which was abhorrent to a majority of the United States Supreme Court in *Furman* and which a majority of this Court saw barred by the operation of Section 921.141 in *Dixon*.

Appellee argues contrarily that PSI reports including such extraneous evidence must be admissible in order to inform the trial judge as to aggravating circumstances expressly included in the statute; but I cannot agree that such a broad rule is necessary to accomplish so limited an objective. Clearly, to me, the state could limit itself to showing by other less prejudicial means prior felony convictions

alone, if any, which constitute an aggravating circumstance under the statute. And, I might add, the burden is upon the state to adduce such limited evidence or it may be presumed by the trial judge that no aggravating circumstances exist which are not otherwise apparent from the trial or sentencing hearing.

Additionally, it appears from the record that there was a "confidential" portion of the PSI report made available to the trial judge *which was not provided to either Appellant or Appellee.* In fact, it is unclear from the record whether this Court has been provided the "confidential" portion thereof for our review, a critical final step between conviction and imposition of the death penalty—one of the safeguards outlined in *Dixon.* What evidence or opinion was contained in the "confidential" portion of the report is purely conjectural and absolutely unknown to and therefore unrebuttable by Appellant. We have no means of determining on review what role such "confidential" information played in the trial judge's sentence, and thus I would overturn Appellant's death sentence on the basis of this fundamental error alone.

Second, Appellant urges, and I agree, that the trial judge erred in failing to find a mitigating circumstance based upon Appellant's impaired mental state at the time of the crime induced by an unusually large amount of alcohol. The record shows uncontroverted evidence that Appellant had been drinking virtually all day and all night prior to killing his wife at some time after midnight. Section 921.141(7)(f) provides as a mitigating circumstance that "[t]he capacity of the defendant to appreciate the criminality of his conduct or to conform his conduct to the requirements of the law was substantially impaired." In *Dixon* this Court said:

> "Mental disturbance which interferes with but does not obviate the defendant's knowledge of right and wrong may also be considered as a mitigating circumstance. Fla.Stat. § 921.141(7)(f), F.S.A. Like subsection (b), this circumstance is provided to protect that person who, while legally answerable for his actions, may be deserving of some mitigation of sentence because of his mental state." 283 So.2d at 10.

With respect to this factor in mitigation, it is especially relevant that one of the psychiatrists ordered by the trial court to examine Appellant found:

> ". . . It is also my medical opinion *had he not been under the influence of alcohol at the time of the alleged crime, he would have been competent,* knowing right from wrong and being capable of adhering to the right. *It is my medical opinion the prisoner is an alcoholic . . .*" (Emphasis supplied.)

The only other court-appointed psychiatrist concurred in this finding in substantially similar language. It is my medical layman's understanding that the more enlightened perspective on alcoholism is that it is no longer considered simply an emotional weakness but rather a form of disease which, like other physical and mental ailments, can cause aberrant behavior and requires treatment. I have never found one's mental condition attributable to alcohol a sufficient legal excuse for a criminal act; however, based on the facts of this case, including the foregoing medical evidence, I consider it a mitigating circumstance under the statute to be considered together with and weighed against any aggravating circumstances. Furthermore, Appellant's conduct subsequent to the murder—including falling asleep with his wife's dead body, seeking his mother-in-law's help the next morning because his wife did not appear to be breathing properly, his failure to attempt to escape and his apparent remorse the next morning upon learning his wife was dead—is consistent with his temporary mental impairment at the time of the crime as a mitigating circumstance.

This was a crime of passion in a marital setting in which the excessive use of alcohol was a material factor resulting in the homicide. As I read our statutes, this type of crime does not merit the death penalty because the discretion exercised to impose that penalty here extends beyond the discretion the statutes repose in governmental officials for such purpose. I do not believe that the statutes contemplate that a crime of this nature is intended to be included in the heinous category warranting the death penalty. A drunken spree in which one of the spouses is killed traditionally has not resulted in the death penalty in this

state. There may, of course, be situations where murder of one's spouse would warrant the death penalty pursuant to the statutes, especially where there is a calculated design and premeditation to rid one of his or her spouse; but this case involving a crime of passion in a drunken spree hardly appears covered by the statutes.

For the reasons stated and the fact that this case will stand as a basis of comparison for future sentences under our new death penalty statutes, I fear the trial judge and this Court have erred in the instant circumstances in sentencing Appellant to death. Accordingly, I would affirm Appellant's conviction and vacate Appellant's sentence of death with directions to impose a sentence of life imprisonment in accordance with the recommendation of the jury.

BOYD, J., concurs.

Supreme Court of the United States

No. 74-6593

DANIEL WILBUR GARDNER,

Petitioner,

vs.

FLORIDA

ON PETITION FOR WRIT OF CERTIORARI TO THE Supreme Court of the State of Florida.

ON CONSIDERATION of the motion for leave to proceed herein *in forma pauperis* and of the petition for writ of certiorari, it is ordered by this Court that the motion to proceed *in forma pauperis* be, and the same is hereby, granted; and that the petition for writ of certiorari be, and the same is hereby, granted, limited to question 2 presented by the petition which reads as follows:

"II. Whether nondisclosure of a 'confidential' portion of a pre-sentence investigation report to a defendant convicted of a capital crime constitutes a denial of the effective assistance of counsel guaranteed by the Sixth and Fourteenth Amendments to the Constitution of the United States, and of the fair hearing as guaranteed by the Due Process Clause of the Fourteenth Amendment, in a case where the trial judge declines to accept a jury recommendation of a life sentence and instead imposes the death sentence partially on the basis of the pre-sentence report?"

July 6, 1976

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1974

No. 74-6593

DANIEL WILBUR GARDNER,

Petitioner,

v.

THE STATE OF FLORIDA,

Respondent.

ON PETITION FOR A WRIT OF CERTIORARI
TO THE SUPREME COURT OF THE
STATE OF FLORIDA

BRIEF FOR RESPONDENT IN OPPOSITION

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OPINIONS BELOW

The opinion of the Supreme Court of Florida is reported at _____So.2d_____(Fla. 1975), Case No. 45,106, opinion filed (slip opinion) February 26, 1975 and is attached hereto as Appendix A.

JURISDICTION

Respondent has no quarrel with the jurisdiction of this Court pursuant to Title 28, United States Code, §1257(3), or under any other provision thereof, at least for purposes of determining whether to decline assumption thereof.

QUESTIONS PRESENTED

QUESTION ONE

WHETHER THE IMPOSITION AND CARRYING OUT OF THE SENTENCE OF DEATH FOR THE CRIME OF FIRST DEGREE MURDER UNDER THE LAW OF FLORIDA VIOLATES THE EIGHTH OR FOURTEENTH AMENDMENT TO THE CONSTITUTION OF THE UNITED STATES.

QUESTION TWO

WHETHER THE TRIAL JUDGE ERRED IN CONSIDERING FACTUAL ALLEGATIONS IN A PRESENTENCE INVESTIGATION REPORT WHERE THE DEATH SENTENCE IS IMPOSED.

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

(1) This case involves the Eighth and Fourteenth Amendments to the Constitution of the United States.

(2) This case also involves the following provisions of the statutes of Florida:

(a) Section 775.082, Florida Statutes.

(b) Section 782.04, Florida Statutes.

(c) Section 918.06, Florida Statutes.

(d) Section 921.141, Florida Statutes.

(3) This case also involves Rules 3.590 and 3.710, Florida Rules of Criminal Procedure.

(a) "RULE 3.590 TIME FOR AND METHOD OF MAKING MOTIONS; PROCEDURE; CUSTODY PENDING HEARING

"(a) A motion for new trial or in arrest of judgment, or both, may be made within four days, or such greater time as the court may allow, not to exceed fifteen days, after the rendition of the verdict or the finding of the court.

"(b) When the defendant has been found guilty by a jury or by the court, such a motion may be dictated into the record, if a court reporter is present, and may be argued immediately after the return of the verdict or the finding of the court. The court may immediately rule upon the motion.

(c) Such motion may be in writing, filed with the clerk; it shall state the grounds on which it is based. A copy of a written motion shall be served on the prosecuting attorney. When the court sets a time for the hearing thereon, the clerk may notify counsel for the respective parties, or the attorney for the defendant may serve notice of hearing on the prosecuting offi cer.

"(d) Until such motion is disposed of, a defendant who is not already at liberty on bail shall remain in custody and not be allowed his liberty on bail unless the court upon good cause shown (if the offense for which the defendant is convicted is bailable) permit the defendant to be released upon bail until the motion is disposed of. If the defendant is already at liberty on bail which is deemed by the court to be good and sufficient, it may permit him to continue at large upon such bail until the motion for new trial is heard and disposed of.

"(b) Substantially the same as first part of Section 920.02(2). The Rule omits the requirement that the defendant be sentenced immediately upon the denial of his motion for new trial (the court might wish to place the defendant on probation or might desire to call for a pre-sentence investigation). The Rule also omits the statute's requirement that an order of denial be dictated to the court reporter, since the clerk is supposed to be taking minutes at this stage.

"(c) Substantially same as Section 920.03.

"(d) Substantially same as last part of Section 920.02(3) except that the last sentence of the Rule is new."

(b) "RULE 3.710. PRESENTENCE REPORT

"[Prior Rule 3.710 transferred to Rule 3.730].

"In all cases in which the court has discretion as to what sentence may be imposed, the court may refer the case to the probation and parole commission for investigation and recommendation. No sentence or sentences other than probation shall be imposed on any defendant found guilty of a first felony offense or found guilty of a felony while under the age of 18 years, until after such investigation has first been made and the recommendations of the commission received and considered by the sentencing judge."

A photostatic copy of the above cited sections of the Florida Statutes are attached hereto as Appendix B.

STATEMENT OF THE CASE

Petitioner, Daniel Wilbur Gardner, a white man, was sentenced to death on January 30, 1974 in the Circuit Court of the Fifth Judicial Circuit of Florida, in and for Citrus County, upon conviction for the premeditated murder of his wife, Mrs. Bertha Mae Gardner, a white woman. The Florida Supreme Court on February 26, 1975 affirmed petitioner's first degree murder conviction and death sentence. See Appendix A.

STATEMENT OF THE FACTS

Glenda Mae Demney, presently residing in Tampa, Florida, suffered a traumatic experience on June 29, 30, 1973. On that date, she was living in Homosassa, Florida. She lived in a trailer right beside her daughter, Bertha Mae Gardner, and her husband, petitioner, Daniel Wilbur Gardner (R Vol.II, pp. 166, 167). Glenda Mae saw her daughter around 7:00 o'clock on June 29, 1973 (R Vol.II, p. 168). Later, after dark, Glenda Mae and Bertha Mae took Bertha Mae's children to the home of Glenda Mae's youngest son. Glenda Mae and Bertha Mae then went on to the Sugar Mill, a local tavern. Glenda Mae let her daughter out at the Sugar Mill and then went back home (R Vol.II, pp. 169, 170). Later Glenda Mae saw Bertha again when Bertha came to her trailer and said she was out of cigarettes. This was about 10 or 10:30 p.m., and Bertha remarked that she was going to look for her husband, petitioner Gardner. As far as Glenda Mae knew Bertha had not had anything of an alcoholic nature to drink (R Vol.II, p. 171). On that particular evening, Glenda Mae was keeping company with Calvin Loenacker, more popularly known as Buckshot. Later in the evening or perhaps in the early morning hours, Glenda Mae and Buckshot were in her trailer. She was

fixing her lunch for the next morning and sipping along on a beer. All of a sudden, the door, hinges and all, came off and her son-in-law, Daniel Wilbur Gardner petitioner was behind it. He hit Glenda Mae on the side of the face, and she was knocked out (R Vol.II, p. 172). The next morning, Glenda Mae was fixing some coffee when her son-in-law came over again and said that her daughter, Bertha Mae, wasn't breathing right (R Vol.II, p. 174). Glenda Mae went next door and saw her daughter naked on a bed with bruises on her face. Glenda Mae didn't know if Bertha was unconscious or not. But as far as she could determine, her son-in-law was not drinking that morning and he did not appear to be intoxicated. She stated that he had been drinking the night before when he came to her trailer and struck her but he was not drunk (R Vol.II, pp. 175, 176). No question about it, Glenda Mae flatly denied a contention that her son-in-law came to her house, knocked on the door and inquired about the whereabouts of his children. Glenda Mae further denied that she slammed the door in her son-in-law's face, that he then kicked the door and it flew open and hit her and knocked her down (R Vol.II, p. 182). Glenda Mae remarked again that her son-in-law knocked her out with his fist and kicked her in the end of her spine "and the door didn't do that." (R Vol.II, p. 183).

Alva Loenecker was a commercial fisherman and long time friend of petitioner Gardner and his wife (R Vol.II, p. 185). He was at Glenda Mae's house on June 29, 1973 drinking some whiskey. At about 11 or 11:30 p.m., petitioner Gardner came over, drug the door off the trailer, came in and hit Glenda Mae and knocked

her out on the floor (R Vol.II, p. 186). Buckshot asked him not to do that any more. Petitioner Gardner remarked that he was going back and beat Hell out of his wife. Buckshot saw Bertha Mae at the door of her trailer, and then gesturing, said that petitioner was pulling her head down at which time Bertha said, "please don't hit me any more." (R Vol.II, p. 187) Approximately 35 minutes later, petitioner Gardner returned to the trailer where Glenda Mae and Buckshot were. Petitioner wanted to jump on Glenda Mae again but Buckshot apparently talked him out of it. Nothing was mentioned concerning the whereabouts of petitioner's children (R Vol.II, p. 188). The next morning, petitioner came to the trailer, called Buckshot and said something was wrong with his wife, Bertha Mae (R Vol.II, p. 189). Glenda Mae got up and she and Buckshot went to petitioner's trailer. On entering the trailer, Buckshot saw Bertha Mae and petitioner remarked that he couldn't understand why his wife didn't wake up. Buckshot said that Bertha Mae looked like she was dead. Petitioner asked him to go call the ambulance (R Vol.II, p. 190).

Nellie Merkerson is the mother of petitioner. She saw Buckshot on the morning of June 30, 1973 and as a result went to the trailer where her son and his wife were living (R Vol.II, p. 196). On arrival at the trailer, she asked her son what had he done, and he denied having done anything at all (R Vol.II, p. 197). After this, Nellie went back to her house, called her daughter-in-law and asked her to call the ambulance. Nellie then returned to her son's trailer and when she saw what had happened and asked her son about it, he said, "She wouldn't tell me where

my babies are and I tried to get her to tell me and she wouldn't so I kept on beating her." (R Vol.II,

David Merkerson is the half-brother of petitioner (R Vol.II, p. 200). David lived about 150 feet from the trailer where petitioner and his wife lived. He went to their trailer on the morning of June 30, 1973. His mother, Nellie Merkerson, his wife Susan, and Bertha's mother, Glenda Mae, were there (R Vol.III, p. 201). Buckshot was outside. When David Merkerson saw Bertha Mae, she was on the bed and "she was dead." A sheet had been pulled up all the way to her neck (R Vol.II, p. 202). David was present when petitioner was placed in the patrol car (R Vol.III, p. 203). At that time, petitioner remarked to him, "Dave, I guess I really did it this time." David answered, "Yes, I guess you did." (R Vol.III, p. 204)

Susan Merkerson is the aunt of petitioner. She lived less than one-half block from where petitioner and his wife lived. Her rest was disturbed at approximately 11:30 p.m. on June 29, 1973 when she was awakened by noises emanating from petitioner's trailer which sounded like someone was bumping or moving furniture around (R Vol.III, p. 206).

Walter Owezarek is an emergency medical technician and on the morning of June 30, 1973 went to the residence of Daniel Wilbur Gardner and Bertha Mae Gardner (R Vol.III, p. 207). Upon arrival, Walter asked where the patient was (R Vol.III, p. 208). Petitioner pointed to a room. Walter saw a woman lying on a bed and examined her but found no vital signs. He looked at her entire body and saw a gigantic hematosa in the pelvic area (R Vol.III, pp. 209, 210). The woman had been so badly bruised that Walter inquired

from the petitioner as to how it happened. Petitioner remarked that his wife probably went out and got some drugs and when she came back she told petitioner to hit her and that he constantly kept pounding on her. When Walter heard this, he called the Sheriff's Department and they all stood by and waited for the officers to arrive (R Vol.III, p. 211). Later after receiving permission from the law enforcement officers, Walter and the ambulance driver removed the body to the Citrus Memorial Hospital (R Vol.III, p. 215).

Lloyd Shelton had been employed as a deputy sheriff of Citrus County, Florida, for approximately 8-1/2 years. On June 30, 1973, he had occasion to go to the residence of petitioner Gardner at approximately 7:00 a.m. (R Vol.III, p. 216). He had known petitioner and his wife prior to this occasion (R Vol.III, p. 217). When he looked at the nude body which had been beaten and bruised, there wasn't any sign of life. He touched the leg just below the knee, and it was cold. He radioed the sheriff's office to send Deputy Williams and for them to call Mr. Green to come to the scene (R Vol.III, p. 218). Deputy Shelton took a lot of photographs inside the premises (R Vol.III, p. 219). Deputy Shelton turned all the evidence over to Deputy George Hanstein (R Vol.III, pp. 230, 231). Later when Deputy Shelton arrested petitioner, he advised him of his constitutional rights, commonly known as Miranda warnings (R Vol.III, p. 239). After Deputy Shelton put petitioner in the car and they were driving along, petitioner remarked,

"Why would a man do something like that"--"why would I do something like that." Petitioner also commented that his wife had been running around with other people and "that thing has been eating on me,--it was just more than I could stand." (R Vol.III, p. 240) Petitioner gave a statement to Deputy Shelton and basically in the statement said that he and his wife got into a fuss after they got home and he beat her. Then she got up and took a bath and when she came back to bed, he beat her some more. And then he went to sleep and didn't wake up until the next morning (R Vol.III, p. 243).

David Chancey first saw the body of Bertha Mae at the Citrus Memorial Hospital. He took the body from Citrus Memorial to the Leesburg General Hospital. No one was with him when he transported the body (R Vol.III, pp. 244, 245). He identified a photograph of the body (State's Exhibit No. 6) as being a photograph of the body he transported.

George Hanstein was a deputy sheriff in Citrus County, Florida. He received three packages from Deputy Shelton which he initialled and processed them for turning over to the Florida Crime Lab in Sanford, Florida. Counsel for the respective parties stipulated to this fact (R Vol.III, pp. 249, 250).

Dr. William H. Shutze is a medical doctor specializing in pathology. Counsel for petitioner at trial had no objection to his qualification as a pathologist licensed to practice in the State of Florida (R Vol.III, pp. 252, 253). Dr. Shutze identified State's Exhibit No. 6 as being a photograph of a body upon which he performed an autopsy on July 2, 1973 at the Leesburg General Hospital. He ascertained that the name of the body of the deceased was Bertha Mae Gardner. This was done from a name tag on the body (R Vol.III, p. 255). Dr. Shutze described the condition of the body and stated that there were at least 100 bruises thereon (R Vol.III, p. 256). And as a result of one injury, it was his opinion that something like a broomstick, bat or bottle had been placed in the vagina (R Vol.III, p. 257). Dr. Shutze estimated that the wounds were perpetrated upon the body of the deceased by combination of instrument, fists, stomping, and rolling on the floor (R Vol.III, p. 258). The cause of death was a result of a combination of a loss of blood from a large tear in the liver and from the fracture of the pubic bone (R Vol.III, p. 259). He estimated that the deceased weighed 90 pounds (R Vol. III, p. 260). On examining the body of the deceased, it was determined that large patches of hair were missing that were not of a diseased nature. Rather, the hair loss resulted from same being pulled out (R Vol.III, p. 261). When counsel for petitioner questioned Dr. Shutze, there was quite a hassle over the identity of the body upon which the doctor performed the autopsy. In fact, counsel for petitioner moved to strike all of the doctor's testimony because he could not positively identify the body upon which he performed the autopsy as being the body of Bertha Mae Gardner (R Vol.III, pp. 262-264). A blood alcohol test was performed with a result of .19 grams percent which Dr. Shutze interpreted as indicating mild to moderate intoxication (R Vol.III, p. 267).

Chandler Smith worked in the Sanford Crime Lab as a criminalist examiner (R Vol.III, pp. 268, 269). He was qualified as an expert without objection. He

testified as to tests performed by him upon certain exhibits and the results thereof (R Vol.III, pp. 270-275).

The petitioner, Daniel Wilbur Gardner, did not take the stand to testify in his own behalf.

REASONS FOR NOT GRANTING THE WRIT

A. The imposition of the death penalty is not in conflict with due process of law.

First, it is emphasized that petitioner's argument under this point has already been twice rejected by the Supreme Court of Florida. Please see State v. Dixon, 283 So.2d 1 (Fla. 1973); and Alford v. State, 307 So.2d 433 (Fla. 1975. The Fourteenth Amendment to the United States Constitution provides in part that no state shall "deprive any person of life, liberty or property without due process of law." This principle of restraint on government dates back to June 19, 1215, when the Magna Carta confirmed that: "No freeman shall be taken, or imprisoned, or dissesed, or outlawed, or exiled, or anywise destroyed, nor shall we go upon him, nor send upon him, but by lawful judgment of his peers or by the law of the land." Magna Carta, Ch. 39. The United States Supreme Court has refrained from making a precise definition of "due process of law." Bute v. Illinois, 333 U.S. 640, 92 L.Ed. 986, 68 S.Ct. 763 (1948). But it has been said that due process concerns itself with the denial of fundamental standards of fairness and ideals; not with power or jurisdiction, but with their exercise. Kinsella v. United States, 361 U.S. 234, 4 L.Ed.2d 268, 80 S.Ct. 297 (1960).

Under our system of divided government, the prescribing of guidelines for criminal punishment is within the power of the legislature, not the courts. When the state provides an orderly procedure for the administration of its criminal law, and those laws are administered in a fair and just manner, these procedures constitute "due process of law." Hurtado v. People of California, 110 U.S. 516, 28 L.Ed. 232, 4 S.Ct. 111 (1884).

B. The imposition of the death penalty is not prohibited under the cruel and unusual punishment provision of the federal and state constitutions.

The Eighth Amendment to the United States Constitution provides that: "Excessive bail shall not be required, nor excessive fines shall not be imposed, nor cruel or unusual punishment inflicted." Section 8, Declaration of Rights, Florida Constitution, states as follows: "Excessive

bail shall not be required, nor excessive fines be imposed, nor cruel or unusual punishment, or indefinite imprisonment be allowed, nor shall witnesses be unreasonably detained." In Collins v. Johnston, 237 U.S. 502, 59 L.Ed. 1071, 35 S.Ct. 649 (1915), it was held that the Eighth Amendment to the United States Constitution was a limitation on the powers of the federal government, not the states. This holding does not appear to have been specifically overturned. See In re Riddle, 22 Cal.Rptr. 472, 372 P.2d 304 (1962). However, more recent decisions would seem to indicate that the Fourteenth Amendment's Due Process Clause prohibits states from inflicting cruel and unusual punishment. U.S. Const. Amend. 14. See State of La. ex rel. Francis v. Resweber, 329 U.S. 459, 91 L.Ed. 422, 67 S.Ct. 374 (1947); Robinson v. California, 370 U.S. 660, 8 L.Ed.2d 758, 82 S.Ct. 1417 (1962). No issue need be made on this point, however, because the acts prohibited by both federal and state constitutions may be and are determined by the same standards.

Initially, it must be borne in mind that the act of imposing the death penalty on petitioner cannot be attacked as cruel and unusual punishment. This is because of the rule that a penalty which is imposed within the terms of a valid statute cannot be cruel and unusual punishment--the statute itself must be attacked.[1]

[1]Federal cases: United States v. Wallace, 269 F.2d 394 (3rd Cir., 1959); Overstreet v. United States, 367 F.2d 83 (5th Cir., 1966); Akers v. United States, 280 F.2d 198 (6th Cir., 1960), cert. den. 364 U.S. 924, 5 L.Ed.2d 262, 81 S.Ct. 289; United States v. Sorcey, 151 F.2d 899 (1946); Hess v. United States, 254 F.2d 578 (8th Cir., 1958); Martin v. United States, 317 F.2d 753 (9th Cir., 1963); Smith v. United States, 273 F.2d 462 (10th Cir., 1959).

State cases: State v. Cuzick, 97 Ariz. 130, 397 P.2d 629 (1964); Blake v. State, 244 Ark. 37, 423 S.W.2d 544 (1968);

The most recent detailed and considered treatment of the concept of "cruel and unusual punishment" given by the United States Supreme Court is found in Weems v. United States, 217 U.S. 349, 54 L.Ed. 793, 30 S.Ct. 544 (1910). In that case a portion of the Penal Code of the Philippine Islands was held unconstitutional. The statute involved authorized punishing a public official for making a false entry on a public record concerning a payment of 616 pesos by a fine of 4,000 pesos, imprisonment of over twelve years with accessories (including carrying chains and deprivation of civil rights during imprisonment), lifetime disqualification from enjoyment of political rights and the holding of office, and perpetual subjection to surveillance. Mr. Justice McKenna's opinion of the court discusses at great length the history, development and meaning of the cruel and unusual punishment prohibition. In language and with reasoning which has not been contradicted to this day, the court said the following with regard to the power of legislatures to define crimes and their punishment:

> "...We concede the power in most of its exercises. We disclaim the right to assert a judgment against that of the legislature of the expediency of the laws or the right to oppose the judicial power to the legislative power to define crimes and fix their punishment, unless that power encounters in its exercise a constitutional prohibition. In such case not our discretion but our legal duty, strictly defined and imperative in its direction, is invoked. Then the legislative power is brought

State v. McNally, 152 Conn. 598, 211 A.2d 162 (1965); Chavigny v. State, 122 So.2d 910 (Fla.App., 1959); King v. State, 416 P. 2d 44 (Idaho, 1966); People v. Calcaterra, 33 Ill.2d 541, 213 N.E.2d 270 (1965); Monson v. Commonwealth, 294 S.W.2d 78 (Ky., 1956); Dobson v. Warden, Maryland Penitentiary, 214 Md. 654, 135 A.2d 890 (1957); State v. Westfall, 367 S.W.2d 593 (Mo., 1963); State v. Pohlabel, 40 N.J. Super: 416, 123 A.2d 391 (1956) State v. Downey, 253 N.C. 348, 117 S.E.2d 39 (1960); McDougle v. Maxwell, 1 Ohio St. 2d 68, 203 N.E.2d 334 (1964); Hardin v. State, 210 Tenn. 116, 355 S.W.2d 105 (1962); Jacke v. State, 167 Tex. Cr. 1, 317 S.W.2d 731 (1958).

to the judgment of a power superior to it for the instant. And for the proper exercise of such power there must be a comprehension of all that the legislature did or could take into account, that is, a consideration of the mischief and the remedy. However, there is a certain subordination of the judiciary to the legislature. The function of the legislature is primary, its exercises fortified by presumption of right and legality, and is not to be interfered with lightly, nor by any judicial conception of their wisdom or propriety. They have no limitation, we repeat, but constitutional ones, and what those are the judiciary must judge. We have expressed these elementary truths to avoid the misapprehension that we do not recognize to the fullest the wide range of power that the legislature possesses to adapt its penal laws to conditions as they may exist and punish the crimes of men according to their forms and frequency. We do not intend in this opinion to express anything that contravenes those propositions." 217 U.S. at 378, 54 L.Ed. at 803, 30 S.Ct. at 553.

Wilkerson v. Utah, 99 U.S. 130, 25 L.Ed. 345 (1878), involved a sentence of death by shooting, following a conviction for premeditated murder. In upholding the constitutionality of the sentence, the court considered the following historical background and meaning of the prohibition against cruel and unusual punishment:

"Cruel and unusual punishments are forbidden by the Constitution, but the authorities referred to are quite sufficient to show that the punishment of shooting as a mode of executing the death penalty for the crime of murder in the first degree is not included in that category, within the meaning of the eighth amendment. Soldiers convicted of desertion or other capital military offences are in the great majority of cases sentenced to be shot, and the ceremony for such occasions is given in great fullness by the writers upon the subject of courts-martial. Simmons, secs. 759, 760; Dehart, pp. 247, 248.

"Where the conviction is in the civil tribunal, the rule of the common law was that the sentence or judgment must be pronounced or rendered by the court in which the prisoner was tried or finally condemned, and the rule was universal that it must be such as is annexed to the crime by law. Of these, says Blackstone, some are capital, which extend to the life of the offender, and consist generally in being hanged by the neck till dead. 4 Bl. Com. 377.

"Such is the general statement of that commentator, but he admits that in very atrocious crimes other circumstances of terror, pain, or disgrace were sometimes superadded. Cases mentioned by the author are, where the prisoner was drawn or dragged to the place of execution, in treason; or where he was embowelled alive, beheaded, and quartered, in high treason. Mention is also made of public dissection in murder, and burning alive in treason committed by a female. History confirms the truth of these atrocities, but the commentator states that the humanity of the nation by tacit consent allowed the mitigation of such parts of those judgments as savored of torture or cruelty, and he states that they were seldom strictly carried into effect. Examples of such legislation in the early history of the parent country are given by the annotator of the last edition of Archbold's Treatise. Arch. Crim. Pr. and Pl. (8th ed.) 584.

"Many instances, says Chitty, have arisen in which the ignominious or more painful parts of the punishment of high treason have been remitted, until the result appears to be that the king, though he cannot vary the sentence so as to aggravate the punishment may mitigate or remit a part of its severity. I Citt. Cr. L. 787; 1 Hale, P. C. 370.

"Difficulty would attend the effort to define with exactness the extent of the constitutional provision which provides that cruel and unusual punishments shall not be inflicted; but it is safe to affirm that punishments of torture, such as those mentioned by the commentator referred to, and all others in the same line of unnecessary cruelty, are forbidden by that amendment to the Constitution. Cooley, Const. Lim. (4th ed.) 408; Wharton, Cr.L. (7th ed.), sect. 3405." 99 U.S. 134-36, 25 L.Ed. 347-48.

In re Kemmler, 136 U.S. 436, 34 L.Ed. 519, 10 S.Ct. 930 (1890), upheld the constitutionality of imposition of the death penalty by electrocution following a conviction of murder. The court discussed the Wilkerson case, supra, and said:

"...Punishments are cruel when they involve torture or a lingering death; but the punishment of death is not cruel, within the meaning of that word as used in the Constitution. It implies there something inhuman and barbarous, something more than the mere extinguishment of life." 136 U.S. at 447, 34 L.Ed. at 524, 10 S. Ct. at 933.

The death penalty did not appear as a cruel and unusual punishment issue in the United States Supreme Court again for fifty-seven years. In State of Louisiana ex rel. Francis v. Resweber, 329 U.S. 459, 91 L.Ed. 422, 67 S.Ct. 374 (1947), the court was confronted with the unique plight of Willie Francis, whose electrocution for murder aborted due to a mechanical failure in Louisiana's electric chair. In rejecting Francis' claim that reimposition of the death sentence was unconstitutional, the court said:

> "Second. We find nothing in what took place here which amounts to cruel and unusual punishment in the constitutional sense. The case before us does not call for an examination into any punishments except that of death. See Weems v. United States, 217 U.S. 349. The traditional humanity of modern Anglo-American law forbids the infliction of unnecessary pain in the execution of the death sentence. Prohibition against the wanton infliction of pain has come into our law from the Bill of Rights of 1688. The identical words appear in our Eighth Amendment. The Fourteenth would prohibit by its due process clause execution by a state in a cruel manner." 329 U.S. at 463, 91 L.Ed. at 426, 67 S.Ct. at 376.

The next time the court considered the death penalty was in Williams v. People of State of New York, 337 U.S. 241, 93 L.Ed. 1337, 69 S.Ct. 1079 (1949), reh. den. 337 U.S. 961, 93 L.Ed. 1760, 69 S.Ct. 1529, reh. den. 338 U.S. 841, 94 L. Ed. 514, 70 S.Ct. 34. In that case it was held that petitioner was not denied due process of law when a trial judge imposed the death penalty following a hearing at which the court considered hearsay information. The jury had recommended life imprisonment, but New York law gave the trial judge discretion to impose the death penalty notwithstanding a jury's recommendation for mercy.

The most recent treatment of the death penalty by the United States Supreme Court is found in Williams v. State of Oklahoma, 358 U.S. 576, 3 L.Ed.2d 516, 79 S.Ct. 421 (1959), reh. den. 359 U.S. 956, 3 L.Ed.2d 763, 79 S.Ct. 737. At issue was petitioner's death sentence on a state kidnapping charge. The court said:

> "Petitioner's further claims that the sentence to death for kidnaping was 'disproportionate' to that crime and to the life sentence that had earlier been imposed upon him for the 'ultimate' crime of murder proceeds on the basis that the sentence for kidnaping was excessive, that the murder was the greater offense, and that the sentence for the lesser crime of kidnaping ought not, in conscience and with due regard for fundamental fairness, exceed the life sentence that was imposed in another jurisdiction for the murder. But the Due Process Clause of the Fourteenth Amendment does not, nor does anything in the Constitution require a State to fix or impose any particular penalty for any crime it may define or to impose the same or 'proportionate' sentences for separate and independent crimes. Therefore, we cannot say that the sentence to death for the kidnaping, which was within the range of punishments authorized for that crime by the law of the State, denied to petitioner due process of law or any other constitutional right." 358 U.S. at 586, 3 L.Ed.2d at 523, 79 S.Ct. at 427.

Not only has the United States Supreme Court refused to hold that the establishment and imposition of the death penalty are unconstitutional acts,[2] there is absolutely no

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[2]Certiorari was denied in Rudolph v. State of Alabama, 175 U.S. 889, 11 L.Ed.2d 119, 84 S.Ct. 155 (1963) over the objections of Justices Goldberg, Douglas, and Brennan, who wanted to consider whether the eighth and fourteenth amendments to the United States Constitution permit the imposition of the death penalty on a convicted rapist who has neither taken nor endangered human life.

discernible trend toward that position in the courts of this country. Thirty-one state courts[3] and ten federal courts[4] have considered constitutional objections to the death penalty, and the law has been upheld on every occasion. From 1878, when the United States Supreme Court upheld the death penalty in Wilkerson v. Utah, supra, to the decision of the Supreme Court of Kansas on April 6, 1968, State v. Kilpatrick, 439 P.2d 99 (Kan., 1968), no court has taken the position advocated by petitioner in the case at bar.

The foregoing clearly establishes that the death penalty per se does not fall within the purview of constitutional prohibitions, "cruelty" refers to matters such as prolonged torture or the inhumane treatment of prisoners. See e.g. Wright v. McMann, 387 F.2d 519 (2nd Cir., 1967); Jackson v. Bishop, 268 F.Supp. 804 (E.D. Ark., 1967); Jordon v. Fitzharris, 257 F.Supp. 674 (N.D.Cal., 1966). "Unusual" punishment refers to a punishment that is substantially different from that provided by similar jurisdictions. Weems v. United States, supra. Legislative authorization for imposition of the death penalty is not unusual in the United States. Respondent therefore submits that petitioner's contentions regarding cruel and unusual punishment are without merit.

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[3]ALABAMA: Boykin v. State, 207 So.2d 412 (Ala., 1968); Ex parte Rudolph, 276 Ala. 392, 162 So.2d 486 (1964); Lee v. State, 227 Ala. 2, 160 So. 164 (1933); cert. den. 227 Ala. 334, 150 So. 169 (1933); Bailey v. State, 211 Ala. 667, 101 So. 546 (1924); ARIZONA: Hernandez v. State, 43 Ariz. 424, 33 P.2d 18 (1934); CALIFORNIA: People v. Thomas, 56 Cal.Rptr. 305, 423 P.2d 233 (1967); People v. Bashor, 48 Cal. 2d 763, 312 P.2d 255, (1957); People v. Jefferson, 47 Cal.2d 438, 303 P.2d 1024 (1956); People v. Daugherty, 40 Cal.2d 876, 256 P.2d 911 (1953), cert. den. 346 U.S. 827, 98 L.Ed.352, 74 S.Ct. 47, reh. den. 346 U.S. 880, 98 L.Ed. 387, 74 S.Ct. 126; People v. Lazarus, 207 Cal. 507, 279 Pac. 145 (1929); People v. Oppenheimer, 156 Cal. 733, 106 Pac. 74 (1910); COLORADO: Bell v. People, 431 P.2d 30 (Colo. 1967); CONNECTICUT: State v. Walters, 145 Conn. 60, 138 A.2d 786 (1958); FLORIDA: Watson v. State, 190 So.2d 161 (Fla. 1966); Craig v. State, 179 So.2d 202 (Fla. 1965); Ferguson v. State, 90 Fla. 105, 105 So.2d 840 (1925); GEORGIA: Manor v. State, 223 Ga. 594, 157 S.E.2d 431 (1967); Abrams v. State, 223 Ga. 216, 154 S.E.2d 118 (1966); Whisman v. State, 221 Ga. 460, 145 S.E.2d 499 (1965); Sims v. State, 221 Ga. 190, 144 S.E.2d 103 (1965); Massey v. State, 220 Ga. 883, 142 S.E.2d 832 (1965); Trimble v. State, 220 Ga. 229, 138 S.E.2d 274 (1964); Vanleeward v. State, 220 Ga. 135, 137 S.E. 452 (1964); Sims v. Balcom, 220 Ga. 7, 136 S.E.2d 766 (1964); ILLINOIS: People v. Chesnas, 325 Ill. 361, 156 N.E. 372 (1927); INDIANA: McCutcheon v. State, 199 Ind. 247, 155 N.E. 544 (1927); IOWA: State v. Burris, 194 Iowa 628, 190 N.W. 38 (1922); KANSAS: State v. Kilpatrick, 439 P.2d 99 (Kan., 1968); KENTUCKY: Workman v. Commonwealth, 309 Ky. 117 216 S.W.2d 415 (1948); Gibson v. Commonwealth, 204 Ky. 748, 265 S.W. 339 (1924); MARYLAND: Jones v. State, 247 Md. 533, 233 A.2d 791 (1967); Dyson v. State, 238 Md. 398, 209 A.2d 609 (1965); Walker v. State, 186 Md. 440, 47 A.2d 47 (1946); Dutton v. State, 123 Md. 373, 91 Atl. 417 (1914); MASSACHUSETTS: In re Storti, 178 Mass. 549, 60 N.E. 210 (1901); MISSISSIPPI: Yates v. State, 253 Miss. 424, 175 So.2d 617 (1965); Gordon v. State, 160 So.2d 73 (Miss., 1964); MISSOURI: State v. Burnett, 365 Mo. 1060, 293 S.W.2d 335 (1956); State v. McGee, 361 Mo. 309, 234 S.W.2d 587 (1950); NEBRASKA: State v. Alvarez, 182 Neb. 358, 154 N.W.2d 746 (1967); NEVADA: Hinrichs v. First Judicial Dist. Court in and For Ormsby County, 71 Nev. 168, 283 P.2d 614 (1955); State v. Geejon, 46 Nev. 418, 211 Pac. 676 (1923); NEW JERSEY: State v. Tomasi, 75 N.J. Law 739, 69 Atl. 214 (1908); NEW MEXICO Territory of New Mexico v. Ketchum, 10 N.M. 718, 65 Pac. 169 (1901); NEW YORK: People v. Durston, 119 N.Y. 569, 24 N.E. 6 (1890); NORTH CAROLINA: State v. Yoes, 271 N.C. 616, 157 S.E. 2d 386 (1967); OHIO: State v. McClellan, 12 Ohio App.2d 204, 232 N.E.2d 414 (1967); Holt v. State, 107 Ohio St. 307, 140 N.E. 349 (1923); OKLAHOMA: Johnson v. State, 79 Okl.Cr. 363, 155 P.2d 259 (1945); Tuggle v. State, 73 Okl.Cr. 208, 119 P.2d 857 (1942); Ellis v. State, 54 Okl.Cr. 295, 19 P.2d 972 (1933); Robards v. State, 37 Okl.Cr. 371, 259 Pac. 166 (1927); OREGON: State v. Butchek, 121 Or. 141, 253 Pac. 367 (1927); SOUTH CAROLINA: State v. Gamble, 155 S.E.2d 916 (So.Car., 1967); Morrer v. McDougal, 245 S.C. 633, 142 S.E.2d 216 (1965); TEXAS: Ellison v. State, 419 S.W.2d 849 (Tex.Cr.App., 1967); Haley v. State, 157 Tex.Crim. 150, 247 S.W.2d 400 (1952); Saucier v. State, 156 Tex.Crim. 301, 235 S.W.2d 903 (1950); Kelley v. State, 124 Tex. Crim. 579, 63 S.W.2d 1024 (1933); VIRGINIA: Johnson v. Commonwealth, 208 Va. 481, 158 S.E.2d 725 (1968); Hart v. Commonwealth, 131 Va. 726, 109 S.E. 582 (1921); WASHINGTON: State v. White, 60 W.2d 551, 374 P.2d 942 (1962); WEST VIRGINIA: State v. Painter, 135 W.Va. 106, 63 S.E.2d 86 (1950); State v. Burdette, 135 W.Va. 312, 63 S.E.2d 69 (1950); WYOMING: Jenkins v. State, 22 Wyo. 34, 135 Pac. 749 (1913).

[4]United States v. Curry, 358 F.2d (2nd Cir., 1966); United States v. Rosenberg, 195 F.2d 583 (2nd Cir., 1952), cert. den. 344 U.S. 838, 97 L.Ed. 652, 73 S.Ct. 20; United States ex rel. Melton v. Hendricks, 330 F.2d 263 (3rd Cir., 1964); Petition of Ernst, 294 F.2d 556 (3rd Cir., 1961); Ralph v. Pepersak, 335 F.2d 128 (4th Cir., 1964); Harris v. Stephens, 361 F.2d 888 (8th Cir., 1966); United States v. Coon, 360 F.2d 550 (8th Cir., 1966) Mitchell v. Stephens, 353 F.2d 129 (8th Cir., 1965); Jackson v. Dickson, 325 F.2d 573 (9th Cir., 1963); Skaug v. Sheehy, 157 F.2d 714 (9th Cir., 1946).

CONCLUSIONS RE: DEATH PENALTY

The most recent appellate decision known to this writer in which a court made an in-depth review of the death penalty is found in the October 29, 1968 opinion of the Washington Supreme Court in State of Washington v. Smith, et al., 466 P.2d 571 (Wash. 1968). This was a case in which the defendants appealed from judgments and sentences entered on verdicts of guilty of two counts of murder in the first degree, four counts of robbery, and one count of assault in the first degree. The special verdicts of the jury imposed the death penalty upon each of them for the second murder count, but only a life sentence for the first. The court ordered that the death penalty should take precedence over the penalties for the other crimes.

On appeal, the defendants claimed that the death penalty was illegally imposed for a number of reasons. The Supreme Court of Washington in rejecting the argument that the death penalty constitutes cruel and unusual punishment remarked as follows:

> "The eighth amendment to the United States Constitution states: 'Excessive bail shall not be required, nor excessive fines imposed, nor cruel and unusual punishments inflicted.'
>
> "Article 1, section 14, of the Washington State Constitution also provides that 'cruel punishment' shall not be inflicted.
>
> "The contention of the defendants here is that the death penalty, even when executed in such a way as to cause a minimum of physical suffering, violates these provisions.
>
> [25] As in the case of the defendants' argument that the taking of life by the state in itself is a denial of due process, the constitutions refute the defendants' contentions. Both constitutions recognize the validity of capital punishment, the federal constitution in amendment 5 and the state constitution in article 1, section 20, which provides that all persons charged with crime shall be bailable, except for capital offenses when the proof is evident or the presumption great.

> "By any dictionary, including Black's Law Dictionary, a capital offense is one punishable by death. The only way these provisions of the two constitutions can be reconciled with provisions forbidding cruel punishment is to conclude that the framers did not consider capital punishment, per se, to be either cruel or unusual, in the sense in which they used those terms in the constitutions.
>
> "Again, the defendants cite no authorities supporting their proposition that the infliction of capital punishment violates these constitutional provisions.
>
> "The Supreme Court of the United State has upheld the validity of executions by shooting (Wilkerson v. Utah, 99 U.S. 130, 25 L.Ed. 345 (1878). Other cases in which the penalty has been approved include Louisiana ex rel. Francis v. Resweber, 329 U.S. 459, 91 L.Ed. 422, 67 Sup.Ct. 374 (1947), rehearing denied, 330 U.S. 853, 91 L.Ed. 1295, 67 Sup.Ct. 673; Williams v. New York, 337 U.S. 241, 93 L.Ed. 1337, 69 Sup.Ct. 1079 (1949), rehearing denied 337 U.S. 961, 93 L.Ed. 1760, 69 Sup. Ct. 1529, rehearing denied 338 U.S. 841, 94 L.Ed. 514, 70 Sup.Ct. 34; and Williams v. Oklahoma, 358 U.S. 576, 3 L.Ed.2d 516, 79 Sup.Ct. 421 (1950), rehearing denied 359 U.S. 956, 3 L.Ed.2d 763, 79 Sup.Ct. 737. Also, the recent case of Witherspoon v. Illinois, 36 U.S.L.W. 4504 (U.S. June 3, 1968), tacitly recognizes the right of a state to provide for the death penalty.
>
> "The defendants do not suggest that the means of execution provided by the statutes of this state is unnecessarily cruel. They do argue vigorously and persuasively that the pronouncement of the death sentence, whatever the means to be used in its execution, subjects the condemned individual to great mental and emotional agony; that the execution of an individual by society is premeditated killing and is immoral; that it is not a deterrent to anyone except the person executed, and that it thwarts the legitimate purposes of rehabilitation. It might also be added that it destroys valuable subject matter for the scientific study of the causes of crime.
>
> "These are all arguments which should be addressed to the legislature, and which have prevailed in the legislatures of a number of states. If, as the defendants maintain, 'upwards of fifty percent' of the people today are opposed to the death penalty, an effort to obtain the elimination of this penalty should have a considerable chance of success."

We think it is wanton murder that brutalizes human nature and cheapens human life, not the penalty for its perpetration. We are not impressed with the argument against capital punishment on the ground of its inhumanity. Of course, it is inhumane. So is murder. But our charity for all human beings must not deprive us of our common sense.

True Christian charity is based upon justice, the proper concern for the weak and innocent, not upon a soft-headed regard for despicable and conspiratorial killers.

Sub judice, the Findings of Fact submitted by the trial judge in support of the death sentence proves conclusively that no mitigating circumstances were ignored. A separate and plenary hearing was conducted on the penalty issue as required by Section 921.141(1), Florida Statutes (R Vol.III, pp. 323-349). The jury was correctly instructed as to their duty in this second phase of the trial (R Vol. III, pp. 350-354), and then the trial judge reread the entire jury instructions to them (R Vol.III, pp. 354-357). Petitioner made no request for any additional instructions or for any corrections to be made to the instructions as given in this phase of the trial (R Vol.III, p. 357). Petitioner had ample opportunity to present anything he so desired for consideration by the jury as a mitigating circumstance. No request was made for the sentencing phase to be continued for the purpose of securing mitigating testimony. Petitioner did not argue in his brief filed in the court below that other mitigating testimony should have been presented to the jury (and the judge) but that he was unable to do so because of lack of time.

In the Findings of Fact (R Vol.I, pp. 49, 50), the trial judge stated:

> "The capital felony was especially heinous, atrocious or cruel; and that such aggravating circumstances outweigh the mitigating circumstances, to-wit: none; and based upon the records of such trial and sentencing proceedings makes the following findings of facts,...."

But petitioner would have this Court believe that since the trial judge found no mitigating circumstances, "The court did not consider appellant's alcohol induced disturbance." (See p. 19 of Appellant's brief filed in the Florida Supreme Court.) However, this begs the question. The real issue was whether petitioner was in an alcoholic stupor when he perpetrated the crime. To have found this to be true, the trial judge of necessity would have had to accord absolute verity to petitioner's testimony given in the sentencing phase of the trial and disregard the testimony of other witnesses who saw him shortly before and after the commission of the crime and testified to his alcoholic state at the trial on the merits. It must be emphasized that the trial judge in considering the sentence to be imposed was not restricted to the testimony of petitioner given in the sentencing phase. Section 921.141(3)(b) provides in pertinent part that when the court imposes the death sentence,

> "...the determination of the court shall be supported by specific written findings of fact...and upon the records of the trial and the sentencing proceedings." (Emphasis supplied.)

Thus, the trial judge had statutory authority to consider the testimony and evidence adduced at the trial proper in arriving at his determination to impose the death sentence. Please see the testimony of Glenda Mae Demney at R Vol.II, pp. 175, 176. Alva Loenecker "Bcukshot" testified that petitioner was "as good a friend as I ever had." But at no time did this witness testify that petitioner was even so much as drinking on the night

of June 29, 1973, let alone being in an alcoholic stupor. In fact, his testimony describing the actions of petitioner on the night in question points unmistakably to the fact that petitioner was in full possession of his faculties (R Vol.II, pp. 185-195). Nellie Merkerson, mother of petitioner, talked with her son on the morning of June 30, 1973 and testified as to the conversation she had with him. At no point in her testimony do we find anything about petitioner telling her that he had been drunk or in an alcoholic stupor. Rather, her testimony as to what petitioner told her clearly shows that there was an argument about the location of the children and petitioner "kept on beating her, she never would tell me where my babies...." This testimony indicates that petitioner had a clear memory of what he had done instead of being in any alcoholic stupor. The trial judge did consider and weigh the evidence presented at the sentencing proceeding as he so states in the Findings of Fact (R Vol.I, p. 49). The simple truth is that the trial judge did not believe the testimony of petitioner given at the sentencing proceeding when viewed in the light of all the testimony adduced at the trial which he was required to consider.

The record shows that the jury returned its verdict of guilt on January 10, 1974 (R Vol.III, p. 322). The second phase or sentencing proceeding was immediately begun (R Vol.III, p. 323). The jury's Advisory Sentence was returned on the same date, January 10, 1974 (R Vol.I, p. 44). However, the trial judge's Findings of Fact was not filed until January 30, 1974, and the death sentence was imposed on the same date. Simple arithmetic shows that the trial judge had a period of twenty days within which to mull over, cogitate on, consider and weigh all of the testimony adduced at the trial and at the sentencing proceeding. Certainly, it cannot be successfully argued that the trial judge was in any haste or in any way eager to impose the death penalty. This was done after an ample period of reflection and consideration of all the proceedings and should not be disturbed by this Court.

It can be agreed that there are many regrettable aspects of life which influence deeds such as the one for which petitioner was convicted and which led to the verdict imposed against him; but insofar as this writer is able to judge, the denial of a fair trial, as the law in its present state can provide it, was not one one of these.

QUESTION TWO

THE TRIAL JUDGE DID NOT ERR IN CONSIDERING FACTUAL ALLEGATIONS IN A PRE-SENTENCE INVESTIGATION REPORT WHERE THE DEATH SENTENCE WAS IMPOSED.

Petitioner's argument under this point is untenable. The simple truth is that if the trial judge had failed to order a pre-sentence investigation, then petitioner would have been able to argue reversible error at least with colorable merit. Rule 3.710, Florida Rules of Criminal Procedure provides:

> "RULE 3.710. PRESENTENCE REPORT
>
> "[Prior Rule 3.710 transferred to Rule 3.730]
>
> "In all cases in which the court has discretion as to what sentence may be imposed, the court may refer the case to the probation and parole commission for investigation and recommendation. No sentence or sentences other than probation shall be imposed on any defendant found guilty of a first felony offense or found guilty of a felony while under the age of 18 years, until after such investigation has first been made and the recommendations of the commission received and considered by the sentencing judge."

The above rule requires the use of a presentence investigation report as a part of the sentencing procedure in two instances:

(1) Where the defendant has been found guilty of a first felony offense, or

(2) Found guilty of a felony while under the age of 18 years. Petitioner in his brief filed in the Florida Supreme Court on p. 13 thereof frankly stated that he had never been convicted. We quote:

> "Some of the offenses for which appellant had previously been arrested were the type of offenses encompassed by §921.141 (6)(b), but there were no convictions." (Emphasis theirs.)

Petitioner's statement in this respect is borne out by a copy of his F.B.I. rap sheet as set out in the presentence investigation conducted by the Florida Parole and Probation Commission. Please see page 9 of supplement to transcript of record. Another thing: Rule 3.710 authorizes the trial judge to refer "all cases in which the court has discretion as to what sentence may be imposed" to the Parole and Probation Commission for investigation and recommendation. Respondent does not believe that it can be successfully contended that Section 921.141 does not authorize the use of discretion by the trial judge in the sentencing procedure in capital cases. The Florida Supreme Court recognized such judicial discretion in State v. Dixon, 283 So.2d 1 (Fla. 1973), wherein the court remarked in pertinent part as follows:

> "Thus, if the judicial discretion possible and necessary under Fla.Stat. §921.141, F.S.A., can be shown to be reasonable and controlled, rather than capricious and discriminatory, the test of Furman v. Georgia, supra, has been met." Id. at 7.

That the judicial discretion permitted under the statute can be shown to be reasonable and controlled, the Florida Supreme Court pointedly remarked:

> "Thus, the discretion charged in Furman v. Georgia, supra, can be controlled and channeled until the sentencing process becomes a matter of reasoned judgment rather than an exercise in discretion at all." Id. at p. 10.

It is respectfully submitted as the Florida Supreme Court so cogently pointed out in Dixon that the mere presence of discretion in the sentencing procedure is not violative of any constitutional right. Rather, it was the quality of discretion and manner in which it was applied that mandated the result in Furman.

But petitioner argues that the consideration of the presentence investigation report vitiated the sentence "in this case by taking the sentencing process out of the bounds established by Fla.Stat. §921.141." Petitioner argues that the presentence investigation report contained allegations that were not based upon the records of the trial and the sentencing proceedings as required by Section 921.141(3)(b). We think this argument goes wide of the mark. Section 921.141(3)(b) provides in pertinent part as follows:

> "In each case in which the court imposes the death sentence, the determination of the court shall be supported by specific written findings of fact based upon ... the records of the trial and the sentencing proceedings."

It is submitted that the use of a presentence investigation report is, indeed, a part of the "sentencing proceedings." Please see 1972 Committee Note appended to Rule 3.710

The trial judge truthfully was eminently correct in ordering the presentence investigation. How else would the trial judge be able to determine whether or not petitioner had previously been convicted of another

capital felony or of a felony involving the use or threat of violence to the person as required by Section 921.141(5)(b)? How else but through the use of a presentence investigation report would the trial judge be able to determine whether or not petitioner had any significant history of prior criminal activity? This is required by Section 921.141(6)(a). Certainly, petitioner must have been aware of the importance of a presentence investigation report because at the trial when the trial judge ordered the presentence investigation, petitioner made no objection thereto (R Vol.III, p. 357). Petitioner filed two motions for new trial, the first of which is found at R Vol.I, p. 46, but nothing is alleged therein about the trial judge having committed reversible error by ordering a presentence investigation. The second motion for new trial is found at R Vol.I, pp. 54-62 but even in this long and comprehensive pleading, nothing is alleged therein about the trial judge having committed reversible error by ordering a presentence investigation report. Interestingly, in Paragraph 19 of this second motion for new trial (R Vol.I, pp. 58, 59), petitioner contends that the circumstances that may be considered in mitigation under Section 921.141 are inadequate, vague, and insufficient. Petitioner argues that his military history, honorable conduct or bravery, motive (if appropriate), his family and its needs, his prior suffe-ing from other than mental conditions, his prior or subsequent moral convictions and behavior, etc. are omitted as mitigating circumstances under Section 921.141(6). However, since the jury returned an Advisory Opinion favorable to him, the question is now academic. Be that as it may, petitioner had ample opportunity to submit anything he so desired in mitigation. The reason respondent points up this matter is because the very items, the alleged absence of which petitioner now complains, can and were reached through the use of a presentence investigation report. The real bone of contention is that because the investigation of the items mentioned in Paragraph 19 of petitioner's second motion for new trial revealed nothing favorable to him, then, of course there was a gross miscarriage of justice and the presentence investigation should never have been ordered. In other words, so petitioner contends, it is alright for a trial judge to order a presentence investigation as long as the results thereof are favorable to him. But when the results are unfavorable, then the trial judge has grossly abused the constitutional rights of petitioner. Respondent finds this a rather specious, if not ridiculous, argument and for this Court to embrace it would be tantamount to petitioner having his cake and eating it too.

In summary, the trial judge was required to order the presentence investigation report; no objection thereto was made by petitioner at trial; the issue was not raised on motion for new trial; use of a presentence investigation report is a part of the sentencing process and is necessary in arriving at a reasoned judgment; and respondent does not believe that the issue of whether non-disclosure of a "confidential" portion of a presentence investigation report was raised in the court below.

The references to the trial transcript have been abstracted and are attached hereto as Appendix C. The references to the brief filed by petitioner in the court below have been abstracted and are attached as Appendix D.

CONCLUSION

The petition for writ of certiorari should be dismissed.

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1976

No. 74-6593

DANIEL WILBUR GARDNER,

Petitioner,

v.

STATE OF FLORIDA,

Respondent.

ON WRIT OF CERTIORARI TO THE SUPREME COURT OF FLORIDA

BRIEF FOR PETITIONER

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BRIEF FOR PETITIONER

I.

OPINION BELOW

The opinion of the Supreme Court of Florida affirming petitioner's conviction of first degree murder and sentence of death by electrocution is reported at 313 So.2d 675 (1975) (A. 149-156). The findings of fact and judgment of the Circuit Court of the Fifth Judicial District of Florida in and for Citrus County finding petitioner guilty and sentencing him to die are unreported and appear at A. 138-140.

II.

JURISDICTION

The jurisdiction of this Court rests upon 28 U.S.C. §1257(3) (1970), the petitioner having asserted below and asserting here a deprivation of rights secured by the Constitution of the United States.

The judgment of the Supreme Court of Florida was entered on February 26, 1975. The petitioner for certiorari was filed on May 24, 1975, and was granted on July 6, 1976.

III.

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

This case involves the Sixth Amendment to the Constitution of the United States, which provides:

> "In all criminal prosecutions, the accused shall enjoy the right . . . to have the Assistance of Counsel for his defence."

It also involves the Due Process Clause of the Fourteenth Amendment.

It further involves the following provisions of the statutes and Rules of Criminal Procedure of the State of Florida:

Fla. Stat. Ann. §775.082 (1975-1976 supp.).

> "Penalties for felonies and misdemeanors
>
> (1) A person who has been convicted of a capital felony shall be punished by life imprisonment and shall be required to serve no less than twenty-five (25) calendar years before becoming eligible for parole unless the proceeding held to determine sentence according to the procedure set forth in section 921.141 results in findings by the court that such person shall be punished by death, and in the latter event such person shall be punished by death. . . ."

Fla. Stat. Ann. §782.04 (1975-1976 supp.).

> "Murder
>
> (1)(a) The unlawful killing of a human being, when perpetrated from a premeditated design to effect the death of the person killed or any human being, or when committed by a person engaged in the perpetration of, or in the attempt to perpetrate, any arson, rape, robbery, burglary, kidnapping, aircraft piracy, or the unlawful throwing, placing, or discharging of a destructive device or bomb, or which resulted from the unlawful distribution of heroin by a person over the age of seventeen (17) years when such drug is proven to be the proximate cause of the death of the user, shall be murder in the first degree and shall constitute a capital felony, punishable as provided in §775.082.
>
> (b) In all cases under this section the procedure set forth in section 921.141 shall be followed in order to determine sentence of death or life imprisonment."

Fla. Stat. Ann. §921.141 (1976-1977 supp.).[1]

> "Sentence of death or life imprisonment for capital felonies; further proceedings to determine sentence

[1] Subsection (1) of this statute was amended slightly in 1974 by Fla. Laws 1974, c. 74-379 (effective October 1, 1974) to provide that if through "impossibility or inability" the trial jury is unable to reconvene for a hearing on sentencing, a special jury may be summoned.

(1) Separate proceedings on issue of penalty.–Upon conviction or adjudication of guilt of a defendant of a capital felony, the court shall conduct a separate sentencing proceeding to determine whether the defendant should be sentenced to death or life imprisonment as authorized by section 775.082. The proceeding shall be conducted by the trial judge before the trial jury as soon as practicable.... If the trial jury has been waived or if the defendant pleaded guilty, the sentencing proceeding shall be conducted before a jury impaneled for that purpose, unless waived by defendant. In the proceeding, evidence may be presented as to any matter that the court deems relevant to sentence, and shall include matters relating to any of the aggravating or mitigating circumstances enumerated in subsections (6) and (7).[2] Any such evidence which the court deems to have probative value may be received, regardless of its admissibility under the exclusionary rules of evidence, provided the defendant is accorded a fair opportunity to rebut any hearsay statements. However, this section shall not be construed to authorize the introduction of any evidence secured in violation of the constitutions of the United States or of the State of Florida. The state and the defendant or his counsel shall be permitted to present argument for or against sentence of death.

(2) Advisory sentence by the jury.–After hearing all the evidence, the jury shall deliberate and render an advisory sentence to the court, based upon the following matters:

(a) Whether sufficient aggravating circumstances exist as enumerated in subsection (6);

---

[2] The subsections setting forth aggravating circumstances and mitigating circumstances in Fla. Stat. Ann. §921.141 (1976-1977 supp.), however, are numbered respectively, (5) and (6).

(b) Whether sufficient mitigating circumstances exist as enumerated in subsection (7), which outweigh the aggravating circumstances found to exist, and

(c) Based on these considerations, whether the defendant should be sentenced to life [imprisonment] or death.

(3) Findings in support of sentence of death.–Notwithstanding the recommendation of a majority of the jury, the court after weighing the aggravating and mitigating circumstances shall enter a sentence of life imprisonment or death, but if the court imposes a sentence of death, it shall set forth in writing its findings upon which the sentence of death is based as to the facts:

(a) That sufficient aggravating circumstances exist as enumerated in subsection (6), and

(b) That there are insufficient mitigating circumstances, as enumerated in subsection (7), to outweigh the aggravating circumstances. In each case in which the court imposes the death sentence, the determination of the court shall be supported by specific written findings of fact based upon the circumstances in subsections (6) and (7) and upon the records of the trial and the sentencing proceedings. If the court does not make the findings requiring the death sentence, the court shall impose sentence of life imprisonment in accordance with section 775.082.

(4) Review of judgment and sentence.–The judgment of conviction and sentence of death shall be subject to automatic review by the Supreme Court of Florida within sixty (60) days after the certification by the sentencing court of the entire record, unless the time is extended for an additional period not to exceed thirty (30) days by the Supreme Court for good cause shown. Such review by the Supreme Court shall have priority

over all other cases and shall be heard in accordance with rules promulgated by the Supreme Court.

(5) Aggravating circumstances.–Aggravating circumstances shall be limited to the following:

(a) The capital felony was committed by a person under sentence of imprisonment.

(b) The defendant was previously convicted of another capital felony or of a felony involving the use or threat of violence to the person.

(c) The defendant knowingly created a great risk of death to many persons.

(d) The capital felony was committed while the defendant was engaged, or was an accomplice, in the commission of, or an attempt to commit, or flight after committing or attempting to commit, any robbery, rape, arson, burglary, kidnapping or aircraft piracy or the unlawful throwing, placing, or discharging of a destructive device or bomb.

(e) The capital felony was committed for the purpose of avoiding or preventing a lawful arrest or effecting an escape from custody.

(f) The capital felony was committed for pecuniary gain.

(g) The capital felony was committed to disrupt or hinder the lawful exercise of any governmental function or the enforcement of laws.

(h) The capital felony was especially heinous, atrocious, or cruel.

(6) Mitigating circumstances.–Mitigating circumstances shall be the following:

(a) The defendant has no significant history of prior criminal activity.

(b) The capital felony was committed while the defendant was under the influence of extreme mental or emotional disturbance.

(c) The victim was a participant in the defendant's conduct or consented to the act.

(d) The defendant was an accomplice in the capital felony committed by another person and his participation was relatively minor.

(e) The defendant acted under extreme duress or under the substantial domination of another person.

(f) The capacity of the defendant to appreciate the criminality of his conduct or to conform his conduct to the requirements of law was substantially impaired.

(g) The age of the defendant at the time of the crime."

Fla. R. Crim. P. 3.710 (1975).

"Presentence Report:–In all cases in which the court has discretion as to what sentence may be imposed, the court may refer the case to the probation and parole commission for investigation and recommendation. No sentence or sentences other than probation shall be imposed on any defendant found guilty of a first felony offense or found guilty of a felony while under the age of 18 years, until after such investigation has first been made and the recommendations of the commission received and considered by the sentencing judge."

Fla. R. Crim. P. 3.711 (1975).

"Presentence Report: When Prepared–(a) Except as provided in subsection (b) the sentencing Court shall not authorize the commencement of the presentence investigation until there has been a finding of guilt.

(b) The sentencing Court may authorize the commencement of the presentence investigation prior to finding of guilt if:

(1) The defendant has consented to such action; and

(2) Nothing disclosed by the presentence investigation comes to the attention of the prosecution, the Court or the jury prior to an adjudication of guilt. Upon motion of the defense and prosecution the Court may examine the presentence investigation prior to the entry of a plea."

Fla. R. Crim. P. 3.712 (1975).

"Presentence Report: Disclosure—The presentence investigation shall not be a public record and shall be available only to the following persons under the following stated conditions:

(a) To the sentencing Court to assist it in determining an appropriate sentence.

(b) To persons or agencies having a legitimate professional interest in the information which it would contain.

(c) To reviewing Courts if relevant to an issue on which appeal has been taken.

(d) To the parties as Rule 3.713 provides."

Fla. R. Crim. P. 3.713 (1975).

"Presentence Investigation Disclosure: Parties—(a) The trial judge may disclose any of the contents of the presentence investigation to the parties prior to sentencing. Any information so disclosed to one party shall be disclosed to the opposing party.

(b) The trial judge shall disclose all factual material, including but not limited to the defendant's education, prior occupation, prior arrests, prior convictions, military service and the like, to the defendant and the State a reasonable time prior to sentencing. If any physical or mental evaluations of the defendant have been made and are to be considered for the purpose of sentencing or release, such reports shall be disclosed to counsel for both parties.

(c) Upon motion of the defendant or the prosecutor or on its own motion, the sentencing Court may order the defendant to submit to a mental or physical examination which would be relevant to the sentencing decision. Copies of such examination or any other examination to be considered for the purpose of sentencing shall be disclosed to counsel for the parties subject to the limitation of Rule 1.713(b) [sic]."[3]

[3] There is no "Rule 1.713(b)."

After petitioner was sentenced to death on January 30, 1974, the Florida legislature enacted Fla. Laws 1974, c. 74-112, §8, effective July 1, 1974. This law, as amended by Fla. Laws 1975, c.75-49, §12, and c.75-301, §2, is now codified as Fla. Stat. Ann. §921.231 (1976-1977 supp.). Section 921.231(1) and (2) provide that presentence investigation reports are mandatory in cases where a defendant has been found guilty or has pleaded guilty to a felony and define the contents of the reports. The next two subsections provide:

"(3) All information in the presentence investigation report should be factually presented and verified if reasonably possible by the preparer of the report. On examination at the sentencing hearing, the preparer of the report, if challenged on the issue of verification, shall bear the burden of explaining why it was not possible to verify the challenged information.

"(4) The nonconfidential portion of the pre-sentence investigation shall constitute the basic classification and evaluation document of the Department of Offender and Rehabilitation and shall contain a recommendation to the court on the treatment program most appropriate to the diagnosed needs of the offender, based upon the offender's custody classification, rehabilitative requirements, and the utilization of treatment resources in proximity to the offender's home environment."

Although subsection four refers to a "nonconfidential portion" of the report, the statute does not elsewhere deal with the question of confidentiality in any way. To the extent that this statute conflicts with Rules 3.710-3.713, quoted *supra*, pp. 6-8, the statute may not be given effect. *See Rhynes v. State*, 312 So.2d 520, 521 (Fla. App. 1975); *Buckles v. State*, 310 So.2d 748, 749 (Fla. App. 1975); *Johnson v. State*, 308 So.2d 127, 128-129 (Fla. App. 1975).

IV.

QUESTION PRESENTED

Whether nondisclosure of a "confidential" portion of a presentence investigation report to a defendant convicted of a capital crime constitutes a denial of the effective assistance of counsel guaranteed by the Sixth and Fourteenth Amendments to the Constitution of the United States, and of the right to a fair hearing as guaranteed by the Due Process Clause of the Fourteenth Amendment, in a case where the trial judge declines to accept a jury recommendation of a life sentence and instead imposes the death sentence partially on the basis of the presentence report?

V.

STATEMENT OF THE CASE

On August 23, 1973, petitioner Daniel Wilbur Gardner was indicted for the first-degree murder of his wife, Bertha Mae Gardner. (A. 3.) From January 7 through January 10, 1974, he was tried in the Circuit Court of the Fifth Judicial Circuit in and for Citrus County, Florida, under the bifurcated capital-trial procedures established by Fla. Stat. Ann. §921.141 (1976-1977 supp.), pp. 3-6 *supra*. He presented no evidence at the guilt phase of the trial (*see* A. 88-90), and the jury convicted him of first degree murder (A. 106, 129). He testified at the penalty phase, and the jury—after deliberating for twenty-five minutes (A. 126—returned an advisory verdict rejecting the death

penalty and recommending a sentence of life imprisonment (A. 126-127, 131). The trial judge ordered and considered a presentence investigation report (A. 126, 130, 138), although only portions of it were disclosed to the defense and prosecution (A. 138). On January 30, 1974, he overrode the jury's recommendation of life imprisonment and sentenced petitioner to die. (A. 138-140.) The Florida Supreme Court affirmed *per curiam* in a brief opinion from which two Justices dissented as to penalty. (A. 149-156.)

In any ordinary case before this Court, our Statement of the Case would represent the version of the facts that was credited by the trier of fact, either explicitly or by implication in its verdict. That approach is impossible here. The sole issue now before the Court relates to the procedures for determining penalty, not guilt. As to penalty, the jury voted for life, and the judge decided for death.

Under Florida's death-sentencing procedure, the jury was not required to state the facts it found. The trial judge was required to make "specific written findings of fact based upon the [aggravating and mitigating] circumstances in subsections (6) and (7) and upon the records of the trial and the sentencing proceedings." Fla. Stat. Ann. §921.141(3)(b) (1976-1977 supp.). But that requirement was ostensibly satisfied here by one factual finding relating to a single aggravating circumstance (uncontested, in any event, as a matter of historical fact), plus the conclusionary finding that "such aggravating circumstances [sic] outweighs the mitigating circumstances, to-wit: none" (A. 138; *see* A. 138-139). What the trial judge found concerning the rest of the case cannot be known.

Finally, the Florida Supreme Court's opinion affirming petitioner's death sentence adds literally nothing to

an assessment of the facts of record. That opinion consists entirely of (1) a statement that the court has jurisdiction of the appeal (¶ 1); (2) a close paraphase of the indictment (¶ 2); (3) a statement that the jury convicted the defendant as charged and recommended a life sentence, but that the trial judge "[a]fter carefully considering and weighing all the evidence presented during the trial and sentencing proceedings" (A. 149) imposed the death sentence (¶ 3); (4) a verbatim quotation of the trial judge's single factual finding, based upon the Medical Examiner's description of the victim's injuries (¶ 3); (5) a statement that the Supreme Court has carefully considered the case, "with the result that we find no reversible error is made to appear and the evidence in the record before us does not reveal that the ends of justice require that a new trial be awarded" (¶ 4); and (6) the following discussion (in its entirety) as to penalty:

> "[u]pon considering all the mitigating and aggravating circumstances and careful review of the entire record in the cause, the trial court imposed the death penalty for the commission of the afore-described atrocious and heinous crime."
>
> "Accordingly, the judgment and sentence of the Circuit Court are hereby affirmed."

(¶¶ 5-7) (A. 151.)

In this state of the record, the only way to present the facts relevant to the federal constitutional issue—that is, the significance of the trial judge's non-disclosure of a part of the presentence investigation report which he read and considered before rejecting the jury's advisory sentence—is to set forth (A) the evidence regarding the offense and the offender that was presented before the jury, and (B) the additional material received by the trial judge but not the jury.

A. The Evidence Presented Before The Jury

The killing of Bertha Mae Gardner occurred on the night of June 29-30, 1973, after Mr. and Mrs. Gardner had been drinking together at a local bar. The Gardners had been married seven years earlier when he was 33 and she was 21. (A. 17.) Mrs. Gardner's mother, Glenda Mae Demney, lived in a trailer owned by petitioner (A. 39) "[r]ight beside" (A. 27) the trailer in which the Gardners and their four children lived.

Petitioner left his trailer about 10:00 a.m. on June 29, and spent the day with friends visiting various bars and liquor stores and drinking large quantities of whiskey, beer, and vodka. (A. 109-113.) That evening, Mrs. Gardner and her mother, who had been drinking beer together (A. 29), took two of the Gardner children to the home of a relative (A. 28). Mrs. Gardner then entered the Sugar Mill Bar between 8:00 and 9:00 p.m. (A. 29.) She returned to the Demney trailer about 10:00 p.m. and announced that she was going to look for petitioner (*ibid.*) and "bring him home" (A. 30).

She again entered the Sugar Mill Bar and joined petitioner at his table where the two had "a couple" (A. 113) of drinks of whiskey together. Petitioner bought a fifth of whiskey when they left the Sugar Mill about 11:30 p.m. (*ibid.*) and they drank from it on the way home. (A. 114.) After having a nightcap with the driver who brought them home (*ibid.*), the Gardners began arguing about their four children, who were not present in the trailer (A. 115). According to the petitioner,

> "[w]hen I first asked her, I said 'who has got the children?', and she asked me wouldn't I like to know, and I said 'yes, I certainly would,' and she

> said 'well, why don't you find out,' and then I asked her, I said 'does your mother have the children,' 'have our children,' and she said 'well, why don't you go find out,' so I said 'O.K., I will.' "

(*Ibid.*)

Between 11:00 and 11:30 p.m., as Mrs. Gardner's mother and a "male friend," Mr. Alva "Buckshot" Loenecker, were drinking whiskey and beer together, petitioner suddenly tore the door off her trailer,[4] rushed in, and, without saying anything, struck Mrs. Demney on the side of the head, knocking her unconscious. (A. 30.) He appeared to her to have been drinking but not to be "drunk." (A. 32.) "Buckshot," who testified that petitioner was "as good a friend as I ever had," then "asked him not to do that no more." (A. 38.) Petitioner responded that "he was going back and beat hell out of his wife and I ["Buckshot"] said 'please don't do that Bill.' " (*Ibid.*). "Buckshot" testified that he did not see petitioner beat his wife (A. 39), but:

> "I seen her [Mrs. Gardner], she was at the door at the [Gardner] trailer, and he put her down like that there and went to pulling her head, and she said 'please don't hit me no more,' it could have been her that said it, now, or could have been the T.V. was playing loud."

(*Ibid.*)

Petitioner returned briefly to the Demney trailer about a half hour later and appeared to "Buckshot" to

[4] Mrs. Demney testified that petitioner "broke down the door" "hinges and all." (A. 30.) "Buckshot" stated that petitioner "[j]ust jerked the door down and come in." (A.42.)

want "to jump on Glenda Mae" Demney again. (*Ibid.*) "Buckshot" told him " 'Bill you done wrong [to hit Mrs. Demney],' and he said 'yeah, I believe I have.' " (*Ibid.*) Petitioner then returned to his trailer.

During the night, petitioner's half-brother, who lived in a house 150 feet away from petitioner's trailer (A. 46), heard petitioner talking (although not loudly) (A. 48). Petitioner's aunt, who lived less than half a block away from petitioner, was awakened at about 11:30 p.m. by "some bumping, moving furniture" in petitioner's trailer. (A. 49.)

At about 7:00 a.m. the next morning, June 30, petitioner reappeared at his mother-in-law's trailer. According to Mrs. Demney, he told her "to come over and check on my [Mrs. Demney's] daughter, said my G.D. [d]aughter, said she wasn't breathing right."[5] (A. 31.) Mrs. Demney proceeded to the Gardner trailer and found her daughter's body lying on the bed, naked and covered with bruises. Mrs. Demney stated that petitioner "wanted me to slap her face, call her, and I said 'I will not, I will call her but I won't slap her,' and I just touched her and told him he had better call an ambulance." (A. 31-32.) Petitioner said nothing, and just "kept mumbling from the front door to the bed room." (A. 32.) When "Buckshot" entered the trailer a few minutes later, he saw petitioner holding the body of his wife:

> "I seen her, he had her up in his arm and her head over here, and that's all I could see. And he said 'I

[5] "Buckshot," who had spent the night in the Demney trailer, testified that petitioner came to that trailer about 7:00 a.m. (A. 41) "and called me, said something was wrong with his wife . . . said something has happened to my wife, that I can't get her awake, looks like she has took some dope" (A. 40).

can't understand why my wife won't wake up, looks like she's–said 'have I killed her or is she dead,' and I said 'she looks like she is dead,' and he asked me to to call the ambulance, and then I went and got his mother."

(A. 40.)

Petitioner's mother testified that she came immediately to the trailer and said to petitioner, " 'Dan, what have you done?', and he says 'I haven't done anything,' he says 'I want somebody to get some help.' " (A. 45.) She had an ambulance called, and then returned to find petitioner weeping on the couch. (*Ibid.*) He said to her " 'mom she wouldn't tell me where my babies are and I tried to get her to tell me and she wouldn't so I kept on beating her, she never would tell me where my babies' . . . [sic]" (*Ibid.*)

Medical tests subsequently indicated that Mrs. Gardner had died from a severe beating and attendant blood loss and internal hemorrhage. (A. 76-78.) In his "Findings of Fact" made for purposes of sentencing, the trial judge summarized the Medical Examiner's testimony concerning the injuries to Mrs. Gardner's body as follows:

"(a) At least one hundred bruises upon her head, both eyes, nose, abdomen, arms, both breasts, chest, back, thighs and legs.

(b) Large patches of healthy hair pulled from her head as a result of her hair being grabbed, leaving bald spots.

(c) Abrasions, bruises and contusions to the head as a result of her hair being grabbed and her head pushed against the wall or floor.

(d) Massive hemorrhage of the scalp, small hemorrhages under the covering of the brain, and contusions of the nose.

(e) Massive hemorrhage of the pubic area, including the inner surfaces of the thigh and the labia of the vulva.

(f) Bruised and swollen external genitalia.

(g) Hemorrhage in and around the right adrenal gland and right kidney.

(h) A large laceration on the perineum extending from the posterior part of the vagina toward the anus.

(i) Large tears inside the vagina from the outside entrance all the way to the back as far as it could go, caused by a broom stick, bat or bottle.

(j) A large laceration or tear of the entire right side of the liver.

(k) The peritoneal cavity or bone located in the pubic area in the lower part of the body, was broken up into small pieces by blunt injury such as being stomped on."

(A. 139.) The autopsy also revealed that at the time of her death, Mrs. Gardner's blood alcohol content was ".19 grams percent" (A. 83) indicating a state of inebriation which was almost twice the level defined as "legal" intoxication (A. 83-84).

The police were summoned, and petitioner was arrested. Shortly before he was placed in the patrol car, he said to his half-brother, " 'Dave, I guess I really did it this time.' " (A. 48.) On the way to the station, petitioner declared to the police officers " 'why would a man do something like that,'–'why did I do something like that,' and . . . [a deputy sheriff] said 'why did you'?" (A. 69.) Petitioner replied that "his wife had been running around with other prople, and said she had been out with his brother, and he said 'that thing has been eating on me,' he said 'it was just more than I could stand.' " (*Ibid.*)

After the jury convicted petitioner of first-degree murder (A. 106, 129), the State introduced two photographs of Mrs. Gardner's badly beaten body (A. 107-108) and then rested without presenting further evidence (A. 108). The State made no sentencing recommendation and waived its right to "present argument for . . . sentence of death," Fla. Stat. Ann. §921.141(1) (1976-1977 supp.). (A. 121.)

In mitigation, petitioner testified that to celebrate a new job which would begin on Monday, July 1, he went on a drinking spree on Saturday, June 29. (A. 112.) During that Saturday, he ate no food but had two shots of whiskey and five beers in the morning. (A. 109-110.) He drank three shots of vodka around noon (A. 110), spent the early afternoon drinking whiskey in the Sugar Mill Bar (A. 111), drank more beer, and then went to another tavern (My Brother's Place) where he drank until after dark (*ibid.*). Subsequently, he returned to the Sugar Mill where he drank two or three additional whiskeys. (A. 112.) He met his wife (who appeared to him also to have been drinking (A. 113)) at the Sugar Mill at about 10:45 or 11:00 p.m. (A. 112-113.) They drank together amicably for awhile and left the bar at about 11:30 p.m., drinking whiskey on the way home. (A. 114.)

Petitioner recalled having an argument with his wife when he discovered that their children were absent. (A. 114-115.) He wanted to know where the children were, and she refused to tell him. (*Ibid.*) He also recalled that he went to his mother-in-law's trailer to look for the children, and that his wife, who had taken off all her clothes, joined him there a little later. (A. 115.) He attempted to take his wife home and "had her by the arm" as she was "fussing with . . . [him]." (A. 116.) His

wife stumbled and fell "more than once" and was "wounded" as a result of these falls. (A. 117.) Petitioner went back to the Demney trailer and had "Mr. Buckshot" come and help him get Mrs. Gardner into the Gardner trailer. (*Ibid.*) When the two men got her back to the trailer, petitioner put her into the bath tub to try and clean her up. (A. 117, 120.) Mrs. Gardner attempted to continue their argument, and petitioner tried to stop it. (A. 117.) He remembered striking his wife on her body with the back of his hand (A. 118), but did not recall ever beating her that night (A. 117).

The jury deliberated for twenty-five minutes (A. 126) and returned an advisory sentencing verdict finding that "the [m]itigating circumstances do outweigh the aggravating circumstances. We therefore advise the court that a life sentence should be imposed herein upon the defendant by the court" (A. 126-127, *see also* A. 131).

B. Additional Material Before The Sentencing Judge

On January 10, 1974, immediately after the jury had retired to consider its advisory sentencing verdict, the trial judge ordered "a pre-sentence investigation of this defendant." (A. 126.)[6] Eighteen days later, on January

[6]Prior to trial, the trial judge had ordered a psychiatric examination of petitioner by Drs. George W. Barnard and Frank Carrera. Their reports were filed, respectively, on January 9 and January 11, 1974, and appear in full at A. 8-19.

Both reports relate petitioner's version of the events surrounding his wife's death (A. 8-9, 12-15) consistently with his trial testimony (pp. 19-20 *supra*), with one possible exception and one addition. (1) Petitioner told the doctors that he had had

(continued)

28, 1974, the presentence investigation report was completed and submitted to the court. (A. 137.) In his

(footnote continued from preceding page)

breakfast with his wife and children sometime after arising at 7:00 a.m. on June 19, 1973, and apparently well before 10:00 a.m. (A. 8, 12.) At trial, he testified that he had had coffee when he got up but told his wife that he did not want breakfast. (A. 108-109.) His narrative of the day's events was interrupted at this point; then, after he described a full day of drinking, he was asked whether "[i]t was late in the evening and you still hadn't had anything to eat all day," and he answered: "To the best of my knowledge, it seems like it was dark. We hadn't had anything to eat." (A. 112.) (2) Petitioner told the doctors that, after he removed his wife from the tub where he had bathed her, "[t]he next memory he has is being in the bed with his wife. He remembered slapping her with the back of his hand on her crotch because it seemed like 'something was there . . . looked like something with a lot of hair . . . one foot in diameter . . . reddish tint to it . . . same color as my wife's hair . . . I didn't think it was part of her.' " (A. 15, ellipsis in original; *see also* A. 8.) There is no detailed description of this matter in petitioner's trial testimony.

The two psychiatric reports contain descriptions of petitioner's prior criminal record (A. 9, 15-16) which are basically the same as that found in the disclosed portion of the presentence investigation report (note 8 *infra*), except for minor discrepancies in arrest dates and the technical labels of arrest charges, and except that petitioner additionally reported to the doctors (1) two motor vehicle violations in the early 1950's (A. 9, 15), and (2) a pickup for investigation and subsequent release in 1953 when petitioner "was investigated with a girl who was connected with drugs" (A. 9; *see also* A. 15).

Both psychiatric reports note (1) the death of petitioner's father shortly before he was born, (2) his mother's remarriage when he was six months old, (3) the separation of his mother from her second husband when petitioner was twelve, (4) petitioner's consequent commitment to a boy's home in Jacksonville between the ages of twelve and fifteen, (5) his quitting of school at age fifteen, (6) a four year stint in the Air Force with an honorable discharge, (7) work as a commercial

(continued)

January 30, 1974 "Findings of Fact," the trial judge recited that the State and petitioner's counsel had both

(footnote continued from preceding page)

fisherman and carpenter thereafter, and (8) a first marriage of seven years' duration prior to his second marriage to Bertha Mae Gardner. (A. 9-10, 16-17.)

Both reports also note petitioner's alcoholism:

> ". . . He has had visual hallucinations one night after drinking heavily and he thought he saw a snake in moss. . . . He has used marijuana several times, but no other illegal drugs. He began the use of alcohol at age 16 and drank heavily every weekend since 1956. He has had the shakes quite a bit but no DT's other than the visual hallucination mentioned above. During the past year, at times he will go 2-3 days drunk. He has had no treatment for his alcohol excess. His sister died of alcoholic cirrhosis of the liver. His father was a heavy drinker, and his half-brother a heavy drinker."

Report of Dr. George W. Barnard (A. 10).

> "[Petitioner] started drinking alcohol when he was 16 years old and began to drink regularly and heavily every weekend from a six-pack to a case of beer. In 1956 after his discharge from the service he began to drink heavier and for 1 year drank daily either whiskey, beer or wine. His drinking in the last 4 years has been that he gets drunk each time he went out on beer and whiskey. The frequency of this was usually every weekend. He denied having delirium tremens but thinks he has had the alcoholic shakes many times. Beginning in the past year he said that his drinking increased and that he would drink it if were there whether he really wanted it or not. He started going on 2 to 3 day drunks which were interrupted by 1 to 2 day dry spells. He would usually drink with friends while they rode around in cars. He felt that his drinking had affected his memory in the past 4 years. He reported that his sister was alcoholic, that his natural father was a heavy drinker and that his youngest half-brother was also a heavy drinker. He has never had Antabuse treatment for his alcoholism."

Report of Dr. Frank Carrera (A. 18).

received "that portion . . . [of the presentence investigation report] to which they are entitled." (A. 138.)[7] The undisclosed portion of the presentence investigation report was not made a part of the record, and the trial judge neither summarized it, disclosed the factual material in it, described it in any way, nor stated any reasons for its non-disclosure. So much of the PSI as petitioner's counsel received was a three page document (A. 133-137) divided into the five sections: (I)

[7] A transcript of the proceedings in open court on January 30, 1974, which was not before the Florida Supreme Court and is not a part of the record before this Court, contains the following remarks:

> "THE COURT: The motion [for a new trial] is denied.
>
> "THE COURT: At this time the Court is filing a findings of [sic] fact in the court file as required by section 921.141 of the Florida Statute, also furnishing the defendant's attorney and the state a copy of the findings of the fact. Has the State and the defendant's attorney each received a copy of that portion of the presentence investigative report to which they are entitled?
>
> "MR. GREEN: The State has, your Honor.
>
> "MR. KOVACH: Defense has, your Honor.
>
> "THE COURT: As reflected by the findings of fact filed in the court file, the Court finds that the aggravating circumstances outweigh the [m]itigating circumstances as reflected by this finding of fact. Does the defendant have anything to say at this time as to why sentence of law should not now be imposed?
>
> "MR. KOVACH: Your Honor, the defendant has previously made its plea for mercy to the Court as having the advisory finding by the jury in this matter, and would again beg the court to grant mercy to the defendant.
>
> "THE COURT: It is the judgment of this Court that the defendant be electrocuted until death in the manner directed by the laws of the State of Florida. The Court hereby appoints the public defender's office to effect an appeal of this proceedings within sixty days to the Florida Supreme Court, as required by law. . . ."

Offense–Information Resume (A. 133); (II) Prior Arrests and Convictions (A. 135);[8] (III) Personal History (ibid.); (IV) Court Officials [sic] Statements (A. 136); and (V) Plan (A. 137). In the "Court Officials Statements" section, State Attorney Trewick Green was quoted as saying that petitioner "had a fair trial and he [Green] will rely on the information revealed by the PSI." (A. 136.) This section also contained the statement that:

> "Law enforcement authorities are quite strong in their opinion of the subject, they consider the subject a menace to society. They feel he should not be let to roam the streets for what he did to his wife. They stated that the subject had a long line of assault charges on his wife, that should be taken into count [sic] about this subject."

(A. 137.)

On January 30, 1974, the trial judge entered the following "Findings of Fact" (in their entirety), and thereupon overruled the jury's recommendation of mercy by sentencing petitioner Gardner to death by electrocution (A. 140):

[8] This section indicated that petitioner had been arrested on a number of occasions but had never been convicted of a felony. The following arrests, spanning a period of twenty years, were noted: "disorderly conduct and fighting" ($25.00 fine); "vagrancy" (dismissed); "malice mischief" (no disposition shown); "disorderly conduct (drunk)" ($10.00 fine); "drunk" ($15.00 fine); "investigation of aggravated assault" (released); "assault WITC murder" (*nolle prosequi* entered); "worthless check ($25.00)" (restitution and court cost); "disorderly conduct" ($30.00 fine); "assault and battery" (dismissed); "assault and battery" (dismissed). (A. 135.)

"THIS CAUSE coming on this day to be considered pursuant to the provisions of Section 921.141, Florida Statutes, as amended by Chapter 72-724, Laws of Florida, after (1) the conviction of the defendant, Daniel Wilbur Gardner, of Murder in the First Degree, by a duly impaneled jury and his adjudication of guilt of such offense, (2) the rendition by such jury at the conclusion of the sentencing proceeding of an Advisory Sentence recommending the imposition of a life sentence, (3) the receipt of a pre-sentence investigative report on said defendant by the undersigned and receipt by the State and defendant's attorney of a copy of that portion thereof to which they are entitled, and after carefully considering and weighing the evidence presented during such trial and sentencing proceeding, the arguments of the attorneys as to the sentence to be imposed and reviewing the factual information contained in said pre-sentence investigation, the undersigned concludes and determines that aggravating circumstances exist, to-wit: The capital felony was especially heinous, atrocious or cruel; and that such aggravating circumstances outweighs the mitigating circumstances, to-wit: none, and based upon the records of such trial and sentencing proceedings makes the following findings of facts, to-wit:

"1. [[9]] That the victim died as a result of especially heinous, atrocious and cruel acts committed by the defendant, the nature and extent of which are reflected by the testimony of Dr. William H. Shutze, District Medical Examiner of the Fifth Judicial Circuit of the State of Florida, as follows:

[The "Findings of Fact" here set forth the eleven subparagraphs numbered (a) through (k)

[9] *Sic*. There is no "2."

which are reproduced at pages 17-18 *supra*, detailing the injuries to Mrs. Gardner's body described by the Medical Examiner.]

and based thereon concludes that the death sentence should be imposed upon said defendant.

Dated this 30th day of January, 1974.

[signed] JOHN W. BOOTH
Circuit Judge"

(A. 138-139.)

On February 26, 1975, the Supreme Court of Florida affirmed petitioner's conviction and death sentence in the six-paragraph *per curiam* opinion that is described (and whose entire discussion of sentencing "review" is quoted in full) at pages 11-12 *supra*. *Gardner v. State*, 313 So.2d 675 (Fla. 1975) (A. 149-156). Mr. Justice Ervin, joined by Mr. Justice Boyd, dissented from affirmance of the sentence upon several grounds, including the unfitness of the death penalty for "a crime of passion in a marital setting in which the excessive use of alcohol was a material factor resulting in the homicide," *id.* at 679 (A. 155), and the "fundamental error" of sentencing petitioner to die after "a 'confidential' portion of the PSI report [was] made available to the trial judge *which was not provided to either* [petitioner or the prosecution]," *id.* at 678 (A. 154) (emphasis in original).

VI.

HOW THE FEDERAL QUESTION WAS RAISED AND DECIDED BELOW

Petitioner's Assignment of Error No. 12 in the Florida Supreme Court contended that "[t]he [trial]

court erred in rendering its findings of fact in support of the death penalty because the court considered factors not based upon the record of the trial and the sentencing proceedings in contravention of Fla. Stat. §921.141(3)" (A. 148); his Assignment of Error No. 13 contended that "[t]he court erred in considering the presentence investigation of defendant" (*ibid.*); and his Assignment of Error No. 18 contended that "[t]he court erred in sentencing defendant to death pursuant to Fla. Stat. §§775.082, 782.04, 921.141 because those statutes contravene the . . . United States Constitutio[n] by depriving defendant of due process . . . in authorizing the death sentence of defendant" (Record on Appeal at 4 [Supplement to Transcript of Record], *Daniel Wilbur Gardner v. State of Florida*, Fla. Sup. Ct. No. 45106). Petitioner's briefs in the Florida Supreme Court argued the non-disclosure claim as follows:

> "The court's express consideration of the p.s.i. report . . . was patently prejudicial to appellant [because it contained allegations not based on the trial record, including a number of prior arrests] . . . . What other recommendations, allegations, statements of opinion, etc. were contained in the confidential portion of the p.s.i. report is a matter of conjecture since the court apparently did not provide either the state or appellant (or the record) with the confidential portion. (R. 49) It should be noted that the jury, without the benefit of the p.s.i. report, recommended mercy while the court, after reading and considering the report, ordered death."

Brief of the Appellant in *Daniel Wilbur Gardner v. Florida*, Fla. Sup. Ct. No. 45106, at 13-14.

> "THE IMPOSITION OF THE DEATH SENTENCE . . . CONTRAVENES THE UNITED STATES . . . CONSTITUTIO[N].* [footnote]*
>
> . . . 'The Court erred in sentencing defendant to death . . . by depriving defendant of due process . . .' [end of footnote] . . . . [T]he trial judge arbitrarily exercised . . . [his] discretion by considering the p.s.i. report. . . ."

Id. at 37-38.

> "The state ignores the court's express consideration of a report containing the opinion of police officers even though there is no legal basis for consideration of police opinion as an aggravating circumstance. More importantly, the state glosses over the court's apparent weighing of the report. The confidential portion of the report is not in the record, and neither appellant nor his counsel can examine that portion of the report. More importantly, this court cannot review significant material relied upon by the sentencing judge."

Reply Brief of the Appellant in *Daniel Wilbur Gardner v. State of Florida*, Fla. Sup. Ct. No. 45106, at 1-2 (footnotes omitted).

> "The [Florida capital punishment] statute does not provide that the court is to base its determination upon matters contained in a p.s.i. report, much less the confidential portion of a p.s.i. report never subject to review by this court."

Id. at 5.

The Florida Supreme Court tacitly rejected this claim when it affirmed petitioner's conviction and sentence in an opinion which discusses no specific issues but recites that "[w]e have . . . examined and considered the record in light of the assignments of error and briefs filed . . . , with the result that we find no reversible error is made to appear. . . ." *Gardner v. State*, 313 So.2d 675, 676-677 (Fla. 1975) (A. 151). Dissenting from this opinion, Mr. Justice Ervin and Mr. Justice Boyd found error in the non-disclosure to petitioner of the "confidential portion" of the PSI:

> "[w]hat evidence or opinion was contained in the 'confidential' portion of the report is purely conjectural and absolutely unknown to and therefore unrebuttable by Appellant. We have no means of determining on review what role such 'confidential' information played in the trial judge's sentence, and thus I would overturn Appellant's death sentence on the basis of this fundamental error alone."

Id. at 678 (A. 154).

VII.

SUMMARY OF ARGUMENT

In a capital sentencing proceeding where the trial judge has ultimate responsibility for pronouncing sentence, a sentencing judge's failure to disclose to defense counsel a portion of a presentence investigative report violates the Due Process Clause of the Fourteenth Amendment and denies a convicted capital defendant the effective assistance of counsel guaranteed by the Sixth Amendment. Where the jury has rendered an advisory sentence of life imprisonment without having seen the presentence report, defense counsel must be able to correct, rebut, or supplement information in the presentence report which might influence the judge to override the jury's sentencing recommendation. In a death case, the Due Process Clause guarantees a defendant the right to fundamentally fair sentencing proceedings where he is afforded adequate notice of the critical facts and issues which will be relevant to sentence and the assistance of counsel in adversarial fact-finding procedures which will

determine whether he lives or dies. Any other rule provides inadequate protection against the imposition of death sentences upon the basis of materially untrue information or less than a full and fair consideration of mitigating (as well as aggravating) factors. Since the trial judge here did not state reasons for his failure to disclose, this case does not present the question whether non-disclosure might be constitutionally justified in particularized situations.

Although there was no contemporaneous objection to the trial judge's failure to disclose a portion of the presentence report, the issue of the federal constitutionality of this non-disclosure was adequately raised in petitioner's Assignments of Error and appellate briefs, and two dissenting Justices in the Florida Supreme Court found it to be "fundamental" and reversible error. Since the practice of the Florida Supreme Court in reviewing death cases for error is to scrutinize the record independently and fully, this Court should review the question despite the fact that the Florida Supreme Court did not explicitly consider this issue (or any other specific issue) in its *per curiam* opinion affirming petitioner's death sentence.

VIII.

ARGUMENT

A. Petitioner's Death Sentence was Imposed and Affirmed in Proceedings that Denied Him a Fair Hearing and the Effective Assistance of Counsel on the Issue of Penalty.

This case presents an extremely narrow question. On the basis of evidence received in open court, the same

jury which convicted petitioner of first-degree murder recommended a sentence of life imprisonment. The presiding judge rejected that recommendation and sentenced petitioner to death "after . . . the receipt of a pre-sentence investigative report." (A. 138.) He did not assert or disclaim reliance upon any particular portion of the report, but recited that his choice of the death penalty had been made "after carefully considering the weighing the evidence presented during [the] . . . trial and sentencing proceeding [and hence available to the jury] . . . and reviewing the factual information contained in said pre-sentence investigation." (*Ibid.*) However:

(1) The judge did not disclose a portion of the presentence investigation report to petitioner or petitioner's trial counsel.

(2) He did not summarize in open court or anywhere in the record the contents or nature of the undisclosed portion of the report.

(3) He did not state reasons for failing to disclose or to summarize it.

(4) He did not state that there *were* particularized reasons, founded upon the record in this case or upon the undisclosed material itself, for failing to disclose or to summarize it.

(5) He did not preserve a sealed copy of the undisclosed portion of the report in the record for consideration by the Florida Supreme Court, which possesses both the power to review the question of nondisclosure and a responsibility "to determine independently whether the imposition of the ultimate penalty is warranted," *Songer v. State*, 322 So.2d 481, 484 (Fla. 1975) (footnote omitted).

Consequently, the issue before this Court is whether the imposition and affirmance of petitioner's death sentence following *those* procedures can be squared with his Sixth Amendment right to the effective assistance of counsel and his Fourteenth Amendment right to a fair hearing on the question of life or death.

Broader issues of a state criminal defendant's right to disclosure of presentence investigation materials considered in connection with noncapital sentencing need not be reached here. As Mr. Justice Stevens has noted, those issues remain unresolved at the federal constitutional level in the wake of *Williams v. New York*, 337 U.S. 241 (1949), which "did not address the . . . question whether the sentencing judge may rely upon critical information about the defendant's past without at least giving him notice of the matter relied upon."[10] Perception of the unfairness of sentencing based upon information that the defendant is given no opportunity to know, challenge, or explain, has heightened dramatically in recent years,[11] but the present case does not require the Court to decide whether that development[12] or the evolution of Sixth and Fourteenth Amendment doctrine[13] now compels the constitutional recognition of the impropriety of basing any criminal sentence upon undisclosed factual

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[10] Mr. Justice Stevens, then Circuit Judge Stevens, dissenting in part in *United States v. Fawcett*, unpublished opinion appended to the dissent from an order withdrawing hearing *en banc* as improvidently granted in *United States v. Rosciano*, 499 F.2d 173, 178 (CA7 1974). *See* pp. 63-64 *infra*.

[11] *See* pp. 49-61 *infra*; Appendices A and B *infra*.

[12] *See* note 38 *infra*.

[13] *See* pp. 39-41, 42-49 *infra*.

materials received "confidentially" by the sentencing judge. For an evolutionary development that "generally reflects simply enlightened policy rather than a constitutional imperative" may nevertheless establish "a constitutionally indispensable part of the process of inflicting the penalty of death";[14] and death is the sentence at issue here.

Nor does the present controversy require decision of the question whether, even in a death case, there may be constitutional occasions, justifications and procedures for the consideration by a sentencing judge of undisclosed presentence material. No justification for non-disclosure was advanced by the trial court below, so the issue now raised is nothing more or less than the constitutionality of unexplained, unjustified non-disclosure. Clearly, the minimal procedures necessary to support appellate consideration of the permissibility of non-disclosure in particularized situations (for example, where a need to protect a confidential informant is asserted)[15] involve, *first*, the trial judge's finding that such a situation exists,[16] and, *second*, his inclusion in the record of a sealed copy of the undisclosed sentencing information and any other undisclosed

[14] *Woodson v. North Carolina*, 44 U.S.L.W. 5267, 5275 (U.S., July 2, 1976) (opinion of Mr. Justice Stewart, Mr. Justice Powell, and Mr. Justice Stevens, announcing the judgment of the Court).

[15] *Cf. Roviaro v. United States*, 353 U.S. 53, 59-62 (1957); *Morrissey v. Brewer*, 408 U.S. 471, 487 (1972); *Kerr v. United States District Court*, 48 L.Ed.2d 725, 733-734 (1976).

[16] *See Morrissey v. Brewer*, 408 U.S. 471, 489 (1972); *Gagnon v. Scarpelli*, 411 U.S. 778, 786 (1973). *Cf. Goldberg v. United States*, 47 L.Ed.2d 603, 616-618 (1976). *Compare Baxter v. Palmigiano*, 47 L.Ed.2d 810, 823-824 (1976).

material upon which his finding rests.[17] Since these procedures were not followed here, no need arises to consider what particularized situations might warrant non-disclosure. The sentencing judge here did not disavow reliance upon the undisclosed material; therefore, it is unnecessary to consider whether such a disavowal would suffice to insulate that material from disclosure.[18]

Our constitutional contention is simply this: at the least, the Sixth and Fourteenth Amendments forbid a judge to impose a death sentence after considering materials that he has received privately and not disavowed for sentencing purposes, unless he discloses those materials or a summary of them to the defense or makes a reviewable finding of good cause for nondisclosure and thereupon places a sealed copy of the materials in the record.

While it is not now strictly necessary to define the sort of summary that would provide an adequate substitute for full disclosure of the original materials received by the judge, the point seems clear that such a summary would have to be sufficiently detailed to give the defense an "opportunity to correct" any "misinformation," *Townsend v. Burke*, 334 U.S. 736, 741 (1948), and also to explain the significance–and to produce facts in extenuation of the apparent adverse

[17] *Cf. Campbell v. United States*, 365 U.S. 85, 92-98 (1961) (Jencks Act materials); *United States v. Seale*, 461 F.2d 345, 364-366 (CA7 1972) (electronic surveillance logs); *and see Rogers v. United States*, 422 U.S. 35, 41 (1975) (communications between court and jury).

[18] *See United States v. Picard*, 464 F.2d 215, 220 (CA1 1972); *United States v. Janiec*, 464 F.2d 126, 131-132 & n.14 (CA3 1972); *United States v. Miller*, 495 F.2d 362, 365 (CA7 1974).

significance–of even admittedly correct information, *cf. Herring v. New York*, 422 U.S. 853 (1975). Anything less would flout the principle that a capital sentencing authority "must be allowed to consider on the basis of all relevant evidence not only why a death sentence should be imposed, but also why it should not be imposed," *Jurek v. Texas*, 44 U.S.L.W. 5262, 5264-5265 (U.S., July 2, 1976) (opinion of Mr. Justice Stewart, Mr. Justice Powell and Mr. Justice Stevens, announcing the judgment of the Court).

This case also does not require definition of the situations constituting "good cause" (*see Morrissey v. Brewer*, 408 U.S. 471, 489 (1972)) for non-disclosure. However, we do note that of the three particularized grounds most commonly asserted to justify the non-disclosure of presentence investigation materials–jeopardy to confidential informants, psychological trauma to the defendant, and interference with his rehabilitative disposition–the second and third grounds seem far-fetched where the sentence is death, and the first ground would be exceedingly difficult to support in the case of an indigent defendant such as petitioner who is condemned to die for killing his wife in the aftermath of an alcoholic binge. But, however this might be and whatever other satisfactory cause for non-disclosure might appear in unusual situations, surely the Sixth and Fourteenth Amendments cannot tolerate non-disclosure of death-sentencing information without *any* stated cause and under procedures that exclude from appellate consideration either the grounds for non-disclosure or the contents of the undisclosed materials.

The predicate of this contention is quickly stated. The Sixth and Fourteenth Amendments entitle a

convicted state criminal defendant to the effective assistance of counsel in sentencing proceedings. *Townsend v. Burke, supra; Mempa v. Rhay*, 389 U.S. 128 (1967). The Due Process Clause of the Fourteenth Amendment guarantees him that those proceedings must be fundamentally fair. *Witherspoon v. Illinois*, 391 U.S. 510 (1968).

The effective assistance of counsel is denied not merely by counsel's outright exclusion from the courtroom but by any hampering "restrictions upon the function of counsel in defending a criminal prosecution in accord with the traditions of the adversary factfinding process." *Herring v. New York*, 422 U.S. 853, 857 (1975). *Accord: Ferguson v. Georgia*, 365 U.S. 570 (1961); *Brooks v. Tennessee*, 406 U.S. 605 (1972); *Geders v. United States*, 47 L.Ed.2d 592 (1976). Fundamental fairness in any sort of proceeding is denied unless, " 'at a minimum [the] . . . deprivation of life, liberty or property by adjudication [is] . . . preceded by notice and opportunity for hearing appropriate to the nature of the case.' " *Goss v. Lopez*, 419 U.S. 565, 579 (1975), quoting *Mullane v. Central Hanover Trust Co.*, 339 U.S. 306, 313 (1950). *Accord: Cole v. Arkansas*, 333 U.S. 196, 201-202 (1948); *In re Gault*, 387 U.S. 1, 33-34 (1967); *Goldberg v. Kelly*, 397 U.S. 254, 267-268 (1970); *Wolff v. McDonnell*, 418 U.S. 539, 563-564 (1974); *and see Henderson v. Morgan*, 49 L.Ed.2d 108, 114 (1976). Where, as under Florida's death-sentencing procedure (*see Proffitt v. Florida*, 44 U.S.L.W. 5256, 5258 (U.S., July 2, 1976) (opinion of Mr. Justice Stewart, Mr. Justice Powell, and Mr. Justice Stevens, announcing the judgment of the Court)), a "new finding of fact . . . that was not an ingredient of the offense charged" has to be made in

order to support a particular sentencing outcome, then "[d]ue process . . . requires that [the defendant] . . . be present with counsel, have an opportunity to be heard, be confronted with witnesses against him, have the right to cross-examine, and to offer evidence of his own." *Specht v. Patterson*, 386 U.S. 605, 608, 610 (1967). *Accord: Humphrey v. Cady*, 405 U.S. 504 (1972).

These constitutional commands are particularly exacting in death cases. *See, e.g., Powell v. Alabama*, 287 U.S. 45, 71-72 (1932); *Hamilton v. Alabama*, 368 U.S. 52, 54-55 (1961); *Witherspoon v. Illinois*, 391 U.S. 510, 521 n.20 (1968); *Reid v. Covert*, 354 U.S. 1, 45-46 (1957) (concurring opinion of Justice Frankfurter); *id.* at 77 (concurring opinion of Justice Harlan). For a cardinal purpose of both the right to counsel and the rudimentary safeguards of procedural due process is to "enhance the reliability of the fact-finding process." *Johnson v. New Jersey*, 384 U.S. 719, 729 (1966); *see also Jackson v. Denno*, 378 U.S. 368, 387-389 & n.16 (1964); *Stovall v. Denno*, 388 U.S. 293, 297-299 (1967); *Berger v. California*, 393 U.S. 314, 315 (1969); *Williams v. United States*, 401 U.S. 646, 653 & n.6 (1971) (plurality opinion of Mr. Justice White). Because "the penalty of death is qualitatively different from a sentence of imprisonment, however long . . . , there is a corresponding difference in the need for reliability in the determination that death is the appropriate punishment in a specific case." *Woodson v. North Carolina*, 44 U.S.L.W. 5267, 5275 (U.S., July 2, 1976) (footnote omitted) (opinion of Mr. Justice Stewart, Mr. Justice Powell, and Mr. Justice Stevens, announcing the judgment of the Court). And a case in which a jury has determined on the basis of trial-tested evidence that death is *not* the appropriate punishment obviously

presents the most manifest need to assure the reliability of any out-of-court information which the sentencing judge may receive and consider in overruling the jury's judgment and imposing a death sentence.

It follows that the non-disclosure of a portion of a PSI report prepared specifically for the purpose of capital sentencing, reviewed by the judge for that purpose, and withheld from the defense without explanation or stated justification, violates both the Sixth Amendment and the Due Process Clause of the Fourteenth Amendment. Both the right to counsel and the basic "requirement of fair play" were invoked in *Townsend v. Burke, supra,* 334 U.S. at 741, to hold that a "sentence . . . predicated on misinformation or misreading of court records" cannot stand. *Ibid.* Townsend, to be sure, had no lawyer at all. But a lawyer who is called upon to speak against the sentence of death and who is simultaneously deprived of knowledge of the factual information upon which the sentencing judge proposes to consider inflicting the extreme penalty is not appreciably better.[19] "The magnitude of a decision to take a human life is probably unparalleled in the human experience of a member of a civilized society." *Marion v. Beto*, 434 F.2d 29, 32 (CA5 1970). In the presentation of effective argument to a decision-maker upon that question, "consultation, thoroughgoing investigation and preparation [are] . . . vitally important." *Powell v. Alabama*, 287 U.S. 45, 57 (1932). "[T]he denial of

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[19] Although *Townsend* was "specifically concerned with the right to the assistance of counsel, it would have been an idle accomplishment to say that due process requires counsel but not the right to reasonable notice and an opportunity to be heard." *Oyler v. Boles*, 368 U.S. 448, 452 (1962) (dictum).

opportunity for appointed counsel to confer, to consult with the accused and to prepare his defense, could convert the appointment of counsel into a sham and nothing more than a formal compliance with the Constitution's requirement that an accused be given the assistance of counsel." *Avery v. Alabama*, 308 U.S. 444, 446 (1940) (dictum).

Townsend firmly establishes that sentencing "on the basis of assumptions . . . which [are] . . . materially untrue . . . , whether caused by carelessness or design, is inconsistent with due process of law." 334 U.S. at 741.[20] Manifestly, the only way in which this substantive rule can be made effective is by recognition of an accompanying procedural right to disclosure (or at least to a reviewable determination of good cause for non-disclosure) of factual materials under consideration by the sentencer. For "[t]here is no irrebuttable presumption of accuracy attached to staff reports. If a decision on [the sentence of life or death] . . . is 'critically important' it is equally of 'critical importance' that the material submitted to the judge . . . be subjected, within reasonable limits . . . , to examination, criticism and refutation." *Kent v. United States*, 383 U.S. 541, 563 (1966). The point that substantive constitutional rights constitutionally require adequate

[20] *See, e.g., United States v. Tucker*, 404 U.S. 443, 447 (1972); *United States v. Malcolm*, 432 F.2d 809, 816 (CA2 1970); *United States ex rel. Jackson v. Myers*, 374 F.2d 707, 710-711 (CA3 1967); *United States v. Janiec*, 464 F.2d 126, 129-130 (CA3 1972); *United States v. Espinoza*, 481 F.2d 553, 555 (CA5 1973); *United States v. Rollerson*, 491 F.2d 1209, 1213 (CA5 1974); *Shelton v. United States*, 497 F.2d 156, 159 (CA5 1974); *Collins v. Buchkoe*, 493 F.2d 343, 345-346 (CA6 1974); *United States v. Weston*, 448 F.2d 626, 632-634 (CA9 1971).

procedures to assure their implementation is no novelty. *See, e.g., Carter v. Texas*, 177 U.S. 442 (1900); *Carnley v. Cochran*, 369 U.S. 506 (1962); *Coleman v. Alabama*, 377 U.S. 129 (1964); *Jackson v. Denno*, 378 U.S. 368 (1964); *Smith v. Illinois*, 390 U.S. 129 (1968); *Simmons v. United States*, 390 U.S. 377 (1968); *Boykin v. Alabama*, 395 U.S. 238 (1969); *North Carolina v. Pearce*, 395 U.S. 711 (1969); *Ham v. South Carolina*, 409 U.S. 524 (1973). Here, the only alternative to requiring disclosure of sentencing information in a manner and at a time that permits its contemporary investigation and correction, rebuttal, or explanation by the defense is to leave the right recognized by *Townsend* subject to invisible denials, or to vindication by sheer accident *if* the undisclosed material somehow happens later to turn up, *see, e.g., Giles v. Maryland*, 386 U.S. 66, 74 (1967) (plurality opinion of Mr. Justice Brennan), and if it can *then* be proved erroneous notwithstanding all of the difficulties that attend retrospective litigation of such issues, *see, e.g., Rogers v. Richmond*, 365 U.S. 534, 547-548 (1961); *Drope v. Missouri*, 420 U.S. 162, 183 (1975).

Moreover, quite apart from *Townsend*, the principle of *Specht v. Patterson, supra,* forbids affirmance of petitioner's death sentence following consideration by his sentencer of materials which petitioner was given no opportunity to review for purposes of possible refutation, explanation, or interpretation "from the point of view most favorable to him," *Herring v. New York*, 422 U.S. 853, 864 (1975). Like the Colorado Sex Offenders Act involved in *Specht*, Florida's bifurcated capital-trial procedure requires "[s]eparate proceedings" following conviction, Fla. Stat. Ann. §921.141(1) (1976-1977 supp.), in which new

"[f]indings in support of sentence of death" must be made, Fla. Stat. Ann. §921.141(3) (1976-1977 supp.), over and above the elements of first-degree murder; and "[i]f the court does not make the findings requiring the death sentence, the court shall impose sentence of life imprisonment," Fla. Stat. Ann. §921.141(3) (1976-1977 supp.). Specifically,

> "if the court imposes a sentence of death, it shall set forth in writing its findings upon which the sentence of death is based as to the facts:
>
> "(a) That sufficient aggravating circumstances exist as enumerated in subsection (6), and
>
> "(b) That there are insufficient mitigating circumstances, as enumerated in subsection (7), to outweigh the aggravating circumstances. In each case in which the court imposes the death sentence, the determination of the court shall be supported by specific written findings of fact based upon the circumstances in subsection (6) and (7) and upon the records of the trial and the sentencing proceedings."

Fla. Stat. Ann. §921.141(3) (1976-1977 supp.).

Upon the new issues thus presented, petitioner could not constitutionally be denied " 'reasonable notice and an opportunity to be heard' " in response to all of the factual information considered by the fact-finder. *Specht v. Patterson, supra,* 386 U.S. at 610, quoting *Oyler v. Boles,* 368 U.S. 448, 452 (1962). He would have been entitled to such basic fair procedures even in a civil proceeding in which his life was not at stake. For "[i]t goes without saying that the requirements of a fair hearing include notice of the claims of the opposing party and an opportunity to meet them." *Federal Trade Commission v. National Lead Co.*, 352 U.S. 419, 427 (1957). If a litigant "is to present his case effectively . . . , he must be cognizant of all the facts before the

[decision-maker]," *Gonzales v. United States*, 348 U.S. 407, 413 (1955), and aware "of the recommendations and arguments to be counted," *id.* at 415. Accordingly, Due Process gives him the right "to know the thrust of [an advisory] . . . recommendation [considered by the decision-maker] so he [can] . . . muster his facts and arguments to meet its contentions." *Id.* at 414. *Cf. Mathews v. Eldridge*, 47 L.Ed.2d 18, 39-40 (1976).

> "The right to a hearing embraces not only the right to present evidence but also a reasonable opportunity to know the claims of the opposing party and to meet them. The right to submit argument implies that opportunity; otherwise the right may be but a barren one. Those who are brought into contest with the Government in [even] a quasi-judicial proceeding . . . are entitled to be fairly advised of what the Government proposes and to be heard upon its proposals before it issues its final command."

Morgan v. United States, 304 U.S. 1, 18-19 (1938). *Accord: Willner v. Committee on Character and Fitness*, 373 U.S. 96, 105 (1963). "Certain principles have remained relatively immutable in our jurisprudence. One of these is that where governmental action seriously injures an individual, and the reasonableness of the action depends on fact findings, the evidence used to prove the Government's case must be disclosed to the individual so that he has an opportunity to show that it is untrue." *Green v. McElroy*, 360 U.S. 474, 496 (1959). " 'Secrecy is not congenial to truth-seeking and self-righteousness gives too slender an assurance of rightness.' " *Goss v. Lopez*, 419 U.S. 565, 580 (1975), quoting *Joint Anti-Fascist Refugee Committee v. McGrath*, 341 U.S. 123, 171 (1951). (concurring opinion of Justice Frankfurter). These precepts define a

"fundamental requisite of due process" in any proceeding, *Grannis v. Ordean*, 234 U.S. 385, 394 (1914); and if they are indispensable in civil or administrative matters, they are indispensable *a fortiori* in the meting out of criminal punishments.[21]

It is therefore clear why the disclosure of presentence investigation reports has been found to be a fundamental element of fair sentencing procedures by the American Bar Association,[22] the American Law In-

[21] *See* note 40 *infra.*

[22] The relevant ABA standard, approved by the House of Delegates in 1968, provides:

> "(a) Fundamental fairness to the defendant requires that the substance of all derogatory information which adversely affects his interests and which has not otherwise been disclosed in open court should be called to the attention of the defendant, his attorney, and others who are acting on his behalf.
>
> "(b) This principle should be implemented by requiring that the sentencing court permit the defendant's attorney, or the defendant himself if he has no attorney, to inspect the report. The prosecution should also be shown the report if it is shown to the defense. In extraordinary cases, the court should be permitted to except from disclosure parts of the report which are not relevant to a proper sentence, diagnostic opinion which might seriously disrupt a program of rehabilitation, or sources of information which has been obtained on a promise of confidentiality. In all cases where parts of the report are not disclosed under such authority, the court should be required to state for the record the reasons for its action and to inform the defendant and his attorney that information has not been disclosed. The action of the court in excepting information from disclosure should be subject to appellate review." AMERICAN BAR ASSOCIATION PROJECT ON MINIMUM STANDARDS FOR CRIMINAL JUSTICE: STANDARDS RELATING TO SENTENCING ALTERNATIVES AND PROCEDURES, Standard 4.4 (Approved Draft, 1968) [hereafter cited as ABA STANDARDS], at pp. 213-214.

stitute,[23] the National Council on Crime and Delinquency,[24] the President's Commission on Law Enforcement and Administration of Justice,[25] and the National

[23] The A.L.I. Model Penal Code requires the court to advise "the defendant or his counsel of the factual contents and the conclusions of any pre-sentence investigation or psychiatric examination and afford fair opportunity, if the defendant so requests, to controvert them." It includes a proviso that "[t]he sources of confidential information need not, however, be disclosed." AMERICAN LAW INSTITUTE, MODEL PENAL CODE §7.07(5) (Proposed Official Draft, 1962), at p. 118. The Advisory Committee wrote that "[l]ess disclosure than this hardly comports with elementary fairness." *Id.*, Comment 2 to §7.07 (Tent. Draft No. 2, 1954), at p. 55.

[24] The NCCD's Model Sentencing Act provides for mandatory disclosure of presentence investigation reports considered in the extended sentencing of dangerous offenders. ADVISORY COUNCIL OF JUDGES OF THE NATIONAL COUNCIL ON CRIME AND DELINQUENCY, MODEL SENTENCING ACT §4 (1963). Disclosure is discretionary in the case of less severe sentences, *ibid.*, but "when the defendant is a dangerous offender, the length of the commitment and the character of the findings required before sentence may be imposed are such that due process requirements suggest additional safeguards for the defendant. Accordingly, the Act requires that the presentence investigation and clinical reports be made available to him." *Id.*, Comment on Article II, at p. 15.

[25] The National Crime Commission recommended that "[i]n the absence of compelling reasons for nondisclosure of special information, the defendant and his counsel should be permitted to examine the entire presentence report." PRESIDENT's COMMISSION ON LAW ENFORCEMENT AND ADMINISTRATION OF JUSTICE, REPORT: THE CHALLENGE OF CRIME IN A FREE SOCIETY 145 (1967). *See also* PRESIDENT'S COMMISSION ON LAW ENFORCEMENT AND ADMINISTRATION OF JUSTICE, TASK FORCE REPORT: THE COURTS 20 (1967) [hereafter cited as TASK FORCE REPORT].

Advisory Commission on Criminal Justice.[26] With few exceptions,[27] scholarly opinion also solidly supports some measure of mandatory disclosure of presentence reports.[28] The exceptions present no obstacle to the constitutional rule which we urge in the present case

[26] The Commission concluded that "[s]entencing courts immediately should adopt a procedure to inform the defendant of the basis for his sentence and afford him the opportunity to challenge it." Specifically," [t]he presentence report and all similar documents should be available to defense counsel and the prosecution." NATIONAL ADVISORY COMMISSION ON CRIMINAL JUSTICE, STANDARDS AND GOALS: CORRECTIONS, Standard 5.16 (1973), at pp. 188-189. The Commission also determined that no exceptions should be made on grounds of confidentiality. *Id.*, Commentary to Standard 5.16, at p. 189.

[27] *See* P. KEVE, THE PROBATION OFFICER INVESTIGATES 6-15 (1960); Barnett and Gronewold, *Confidentiality of the Presentence Report*, 26 FED. PROB. (No. 1) 26 (March 1962); Hincks, *In Opposition to Rule 32(c)(2), Proposed Federal Rules of Criminal Procedure*, 8 FED. PROB. (No. 4) 3 (Oct.-Dec. 1944); Parsons, *The Presentence Investigative Report Must Be Preserved as a Confidential Document*, 28 FED. PROB. (No. 1) 3 (March 1964); Roche, *The Position for Confidentiality of the Presentence Investigation Report*, 29 ALBANY L. REV. 206 (1965); Sharp, *The Confidential Nature of Presentence Reports*, 5 CATH. U. L. REV. 127 (1955); Wilson, *A New Arena is Emerging to Test the Confidentiality of Presentence Reports*, 25 FED. PROB. (No. 4) 6 (Dec. 1961); *Federal Judge's Views on Probation Practices*, 24 FED. PROB. (No. 1) 10 (March 1960).

[28] *See* M. FRANKEL, CRIMINAL SENTENCES 27-33 (1973); S. RUBIN, CRIME AND JUVENILE DELINQUENCY 195-204 (1961); P. TAPPAN, CRIME, JUSTICE, AND CORRECTION 558 (1960); Bach, *The Defendant's Right of Access to Presentence Reports*, 4 CRIM. L. BULL. 160 (April 1968); Cohen, *Sentencing, Probation and the Rehabilitative Ideal: The View From Mempa v. Rhay*, 47 TEX. L. REV. 1 (1968); Gray, *Post-Trial Discovery: Disclosure of the Presentence Investigation Report*, 4 U. TOLEDO L. REV. 1 (1972); Guzman, *Defendants'*

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because the reasons they advance against disclosure are either inapplicable here or invoke considerations that can be accommodated by permitting non-disclosure for good cause shown in discrete and limited situations[29] –an issue which, as we have indicated, is simply not raised on this record.

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Access to Presentence Reports in Federal Criminal Cases, 52 IOWA L. REV. 161 (1966); Harkness, *Due Process in Sentencing: A Right to Rebut the Presentence Report?*, 2 HASTINGS CONST. L.Q. 1065 (1975); Higgins, *Confidentiality of Pre-Sentence Reports*, 28 ALBANY L. REV. 12 (1964); Kadish, *The Advocate and the Expert: Counsel in the Peno-Correctional Process*, 45 MINN. L. REV. 803, 806 (1961); Katkin, *Pre-Sentence Reports: An Analysis of Uses, Limitations and Civil Liberties Issues*, 55 MINN. L. REV. 15 (1970); Kuh, *For a Meaningful Right to Counsel on Sentencing*, 57 A.B.A.J. 1096 (1971); Lehrich, *The Use and Disclosure of Presentence Reports in the United States*, 47 F.R.D. 225 (1969); Lowensen, *The Disclosure to Defense of Presentence Reports in West Virginia*, 69 W. VA. L. REV. 159 (1967); Rubin, *Sentences Must Be Rationally Explained*, 42 F.R.D. 203, 215-216 (1967); Schaffer, *The Defendant's Right of Access to Presentence Reports*, 3 CRIM. L. BULL. 674 (Dec. 1967); Thomsen, *Confidentiality of the Presentence Report: A Middle Position*, 28 FED. PROB. (No. 4) 8 (March 1964); Wyzanski, *A Trial Judge's Freedom and Responsibility*, 65 HARV. L. REV. 1281, 1291-1292 (1954); Zastrow, *Disclosure of the Presentence Report*, 35 FED. PROB. (No. 4) 20 (Dec. 1971); Note, *Disclosure of Presentence Reports in Federal Court: Due Process and Judicial Discretion*, 26 HASTINGS L.J. 1527 (1975); Note, *Disclosure of Presentence Reports: A Constitutional Right to Rebut Adverse Information by Cross-Examination*, 3 RUTGERS-CAMDEN L.J. 111 (1971); Note, *The Pre-sentence Report: An Empirical Study of Its Use in the Federal Criminal Process*, 58 GEO. L. F. 451 (1970); Comment, *Federal Rules of Criminal Procedure 32(c)(2); Confidentiality or Constitutionality*, 2 LINCOLN L. REV. 66 (1966).

[29] Advocates of nondisclosure customarily cite three reasons for their position. First, they argue that disclosure would tend to

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On the other hand, the principal reasons which the overwhelming number of authorities have accepted as supporting a requirement of mandatory disclosure

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dry up sources of information. Members of the defendant's family, employers or other informants would be reluctant to supply information if they knew that it could be traced back to them, and agencies which supplied information only on a confidential basis would make their records unavailable to probation officers. Second, it is contended that disclosure would cause unreasonable delay in sentencing because defendants would challenge everything in every presentence report, and thereby transform the sentencing determination into a lengthy and burdensome proceeding. Finally, it is argued that to disclose the contents of the presentence report might be harmful to rehabilitative efforts, especially where the report contains psychiatric evaluations or unfavorable comments by the probation officer who might be assigned to supervise the defendant.

The problem with these arguments, of course, is that they do not support a general rule or policy of nondisclosure, although they are sometimes used quite inexplicably by their proponents for that purpose. The ABA Advisory Committee has rightly criticized the latter form of argument on the ground that "each [objection to disclosure] is aimed at a specific evil which may indeed be a legitimate cause for concern, but yet is generally asserted as supporting nondisclosure in all cases irrespective of the existence of even a remote possibility in the particular case of the actual occurrence of the feared ABA STANDARDS, *supra* note 22, at 218. Once the fallacy of over-generalization is avoided, it becomes plain that the several common arguments for non-disclosure are, in fact, altogether consistent with a general rule of disclosure subject to, at most, some limited exceptions. This is plainly the case insofar as a presentence investigation report may include information from confidential informants or unsettling psychiatric evaluations. And concern lest defendants' responses to the PSI get out of hand can be met by controlling the form and length of those responses, rather than by totally denying any opportunity to respond. *Cf. Herring v. New York, supra,* 422 U.S. at 862-863. Significantly, none of the fears of adverse consequences of disclosure has been borne out by the

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(except, perhaps, for good cause shown in special situations) go to the heart of this case. The first and most important reason is that "fundamental fairness requires that the accused be given a reasonable opportunity to challenge the accuracy of facts or the reliability of opinions on which the judge will base his sentencing decision."[30] The second is that, without

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experience of the jurisdictions in which presentence reports have routinely been given to the defense for many years. *See, e.g., State v. Kunz,* 55 N.J. 128, 259 A.2d 895, 897 (1969); *Commonwealth v. Phelps*, 450 Pa. 597, 301 A.2d 678, 681-682 (1973); ABA STANDARDS, *supra* note 22, at 219-220; *Guzman, supra* note 28, at 168-169; Higgins, *supra* note 28, at 31-32; Thomsen, *supra* note 28, at 9; Zastrow, *supra* note 28, at 21-22; HASTINGS Note *supra* note 28, at 1542-1543; RUTGERS-CAMDEN Note, *supra* note 28, at 124-125.

In any event, the constitutional rule which we urge here goes no further than death cases. In such cases, concern for the traumatic effect of disclosure upon the defendant, or for interference with his "rehabilitation", approaches a cruel joke. The number of capital trials is hardly sufficient to support apprehension that the system of criminal justice in this country cannot take the time for careful review of facts considered as the basis for a death sentence; indeed, in view of the stakes, it is intolerable to suggest that those facts *not* be painstakingly examined. There remains, therefore, the question of confidential informants–a narrow enough problem with which this Court has been able to deal in other contexts, *see* note 15 *supra*, and which surely can be treated on a special footing in the present context if and when the issue arises–as here it does not.

[30] ABA STANDARDS, *supra* note 22, at 218. *See also* TASK FORCE REPORT, *supra* note 25, at 20; RUBIN, *supra* note 28, at 200-203; TAPPAN, *supra* note 28, at 558; Bach, *supra* note 28, at 170; Gray, *supra* note 28, at 4; Guzman, *supra* note 28, at 164-166; Harkness, *supra* note 28, at 1068; Higgins, *supra* note 28, at 25-29; Lehrich, *supra* note 28, at 238-246; Lowensen, *supra* note 28, at 164; Rubin, *supra* note 28, at 216-217; Wyzanski, *supra* note 28, at 1291; GEORGETOWN Note, *supra* note 28, at 473-475; HARVARD Note, *supra* note 28, at 836-838; HASTINGS Note, *supra* note 28, at 1537.

access to the information which the sentencing judge will consider, the defendant's right to effective assistance of counsel at sentencing is rendered illusory.[31] The third is that disclosure is essential to the appearance of fairness, a rudimentary goal of the criminal process.[32] Surely no less in capital cases than in others, " 'justice must satisfy the appearance of justice.' " *Mayberry v. Pennsylvania*, 400 U.S. 455, 465 (1971), quoting *Offutt v. United States*, 348 U.S. 11, 14 (1954). "If [an offender] . . . is sentenced on information that he has not seen or had any chance to deal with and rebut, he cannot believe that he has been treated with impartiality and justice." NATIONAL ADVISORY COMMISSION ON CRIMINAL JUSTICE, STANDARDS AND GOALS, Commentary to Standard 5.16 (1973), at p. 189. One might contend that it does not matter what the defendant thinks when he will soon be dead. But that contention cannot be justified within the framework of a constitutional scheme that requires capital punishment to be administered in "accord with 'the dignity of man.' " *Gregg v. Georgia*, 44 U.S.L.W. 5230, 5236 (U.S., July 2, 1976) (opinion of Mr. Justice Stewart, Mr. Justice Powell, and Mr. Justice Stevens, announcing the judgment of the Court), quoting *Trop v. Dulles*, 356 U.S. 86, 100 (1958) (plurality opinion)).

Also obviously applicable is Professor Kenneth Culp Davis' more general observation that "[o]penness is the natural enemy of arbitrariness and a natural ally in the

[31] *See* Kuh, *supra* note 28, at 1096; HASTINGS Note, *supra* note 28, at 1537-1539; RUTGERS Note, *supra* note 28, at 115.

[32] *See, e.g.*, ABA STANDARDS, *supra* note 22, at 224; Harkness, *supra* note 28, at 1071.

fight against injustice."[33] For "[t]he touchstone of due process is protection of the individual against arbitrary action of government," *Wolff v. McDonnell*, 418 U.S. 539, 558 (1974); and we hardly need to labor the especial concern of the Constitution against arbitrariness in capital sentencing in the wake of *Furman v. Georgia*, 408 U.S. 238 (1972).[34]

The considerations which have persuaded commissions and commentators have also persuaded legislatures and courts. Recently enacted statutes,[35] recently

[33] K. DAVIS, DISCRETIONARY JUSTICE: A PRELIMINARY INQUIRY 98 (1971). *See also Joint Anti-Fascist Refugee Committee v. McGrath*, 341 U.S. 123, 170 (1951) (concurring opinion of Justice Frankfurter):

> "The heart of the matter is that democracy implies respect for the elementary rights of men, however, suspect or unworthy; a democratic government must therefore practice fairness; and fairness can rarely be obtained by secret, one-sided determination of facts decisive of rights."

[34] *See Gregg v. Georgia*, 44 U.S.L.W. 5230, 5240, 5242 n.47 (U.S., July 2, 1976) (opinion of Mr. Justice Stewart, Mr. Justice Powell, and Mr. Justice Stevens, announcing the judgment of the Court); *id.* at 5250 (opinion of Mr. Justice White, with whom the Chief Justice and Mr. Justice Rehnquist joined); *Woodson v. North Carolina*, 44 U.S.L.W. 5267, 5274 (U.S., July 2, 1976) (opinion of Mr. Justice Stewart, Mr. Justice Powell, and Mr. Justice Stevens, announcing the judgment of the Court); *Roberts v. Louisiana*, 44 U.S.L.W. 5281, 5283-5284 (U.S., July 2, 1976) (opinion of Mr. Justice Stewart, Mr. Justice Powell, and Mr. Justice Stevens, announcing the judgment of the Court).

[35] Since 1972, thirteen States have joined the number that provide by statute for some measure of mandatory disclosure of presentence reports: Arkansas (1975); Connecticut (1973); Hawaii (1972); Illinois (1972); Indiana (1973); Kansas (1973); Kentucky (1974); Maryland (1972); New Hampshire (1973); New York (1975); Oklahoma (1975); Oregon (1973); Utah (1973). *See* Appendix A *infra*.

promulgated rules,[36] and recent judicial decisions[37] demonstrate an accelerating and "significant movement

[36]Since 1972, eight States have promulgated rules of court providing for some measure of mandatory disclosure of presentence reports: Alaska (1974; Arizona (1972); Colorado (1974); Michigan (1973); New Mexico (1975); Ohio (1973); Pennsylvania (1973); Washington (1975). *See* Appendix A *infra.*

[37]For example, in *State v. Kunz*, 55 N.J. 128, 259 A.2d 895 (1969), the Supreme Court of New Jersey announced that "in all future sentencing proceedings, defendants will be entitled to disclosure of the presentence report, with fair opportunity to be heard on any adverse matters relevant to the sentencing." 259 A.2d at 903. This step was not taken "as a matter of constitutional compulsion" ("[a]lthough persuasive constitutional arguments have been advanced") but "as a matter of rudimentary fairness." *Ibid.* In particular, the court noted that

> "[i]t is indeed difficult to see how there can be meaningful representation by counsel at sentencing time when there is no disclosure to him of the presentence materials on which the sentence is being based. And surely without such materials he is in no fair position to determine . . . how to prosecute [an appeal from the sentence] . . . if it is taken."

259 A.2d at 900. Four years later the Supreme Court of Pennsylvania agreed "with the New Jersey Supreme Court that 'even apart from the overriding consideration of fairness and justness, [disclosure] will serve to improve and strengthen probation reports by promoting greater accuracy on the part of the officials as well as the persons who supply information to them.'" *Commonwealth v. Phelps*, 450 Pa. 597, 301 A.2d 678, 683 (1973). After carefully reviewing all of the arguments advanced against disclosure and finding that none of them supported anything more than a limited exception to the general requirement of mandatory disclosure of all presentence materials, 301 A.2d at 681-683, the court adopted ABA Standard 4.4, set out in note 22 *supra*, because "the efficient and just administration of criminal justice is best served by the appropriate disclosure of relevant portions of [the presentence] . . . report, not secured on a promise of confidentiality." 301 A.2d at 679. With regard to the latter exception, the court

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towards mandatory disclosure." *State v. Kunz*, 55 N.J. 128, 259 A.2d 895, 899 (1969). We summarize these developments in Appendices A and B *infra* (dealing respectively with the several States and the federal courts), for the purpose of showing the extent and force of contemporary recognition of the basic point of our argument:[38] "that disclosure ought to be the preferred and presumed rule, subject only to exceptions for rare and unique cases where the judge perceives specific dangers or injuries to be avoided."[39]

Those appendices also show that even if the rule for which we argue were extended to all sentences for felonies, it would conform to current practice in the large majority of States and in the federal system. But we need not here burden the Court with such a demonstration. This is a death case; "death is different in kind from any other punishment imposed under our system of criminal justice," *Gregg v. Georgia*, 44

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highlighted the ABA provision permitting non-disclosure "'[*i*]*n extraordinary cases*, [of] . . . sources of information . . . obtained on a promise of confidentiality,'" 301 A.2d at 682 (emphasis supplied by the court); and it insisted that, where this exception is invoked, adequate procedures must be followed to permit appellate review of its applicability. 301 A.2d at 682 n.6. The Oregon Supreme Court in *Buchea v. Sullivan*, 262 Ore. 222, 497 P.2d 1169 (1972), also recognized the importance of protecting confidential sources in appropriate situations, but held that "it would be a deprivation of due process and of the services of counsel to withhold . . . information [where] . . . no countervailing public interest [such as confidentiality] requires its non-disclosure." 497 P.2d at 1177. *See also State v. Pierce*, 108 Ariz. 174, 494 P.2d 696 (1972).

[38]*See Bloom v. Illinois*, 391 U.S. 194, 202-208 (1968); *Mullaney v. Wilbur*, 421 U.S. 684, 694-696 (1975).

[39]M. FRANKEL, CRIMINAL SENTENCES 31 (1973).

U.S.L.W. 5230, 5240 (U.S., July 2, 1976) (opinion of Mr. Justice Stewart, Mr. Justice Powell, and Mr. Justice Stevens, announcing the judgment of the Court). It is axiomatic that "[t]he extent to which procedural due process must be afforded [an individual] . . . is influenced by the extent to which he may be 'condemned to suffer grievous loss.'" *Goldberg v. Kelly*, 397 U.S. 254, 263 (1970), quoting *Joint Anti-Fascist Refugee Committee v. McGrath*, 341 U.S. 123, 168 (1951) (concurring opinion of Justice Frankfurter).[40] In the proceedings below and here, petitioner stood and stands to lose his life; we submit only that he was constitutionally entitled (1) to know the information considered by his sentencer as the basis for inflicting *that* loss, or (2) at least to have a reviewable finding of good cause why such knowledge was denied him, and to have any undisclosed information transmitted under seal to the Florida Supreme Court, which must and does consider "the total record," *Swan v. State*, 322 So.2d 485, 489 (Fla. 1975), in the exercise of its "separate responsibility to determine independently whether the imposition of the ultimate penalty is warranted," *Songer v. State*, 322 So.2d 481, 484 (Fla. 1975) (footnote omitted).

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[40] This court has repeated in many decisions applying the Due Process Clause that "[t]he formality and procedural requisites for the hearing [which the Constitution demands] can vary, depending on the importance of the interests involved and the nature of the subsequent proceedings." *Boddie v. Connecticut*, 401 U.S. 371, 378 (1971) (footnote omitted). *See, e.g., Bowles v. Willingham*, 321 U.S. 503, 520 (1944); *Hannah v. Larche*, 363 U.S. 420, 440-442 (1960); *Cafeteria and Restaurant Workers Union v. McElroy*, 367 U.S. 886, 895 (1961); *Bell v. Burson*, 402 U.S. 535, 540 (1971); *Morrissey v. Brewer*, 408 U.S. 471, 481-490 (1972); *Mathews v. Eldridge*, 47 L.Ed.2d 18, 33-42 (1976).

Neither *Williams v. New York*, 337 U.S. 241 (1949), nor *Williams v. Oklahoma*, 358 U.S. 576 (1959), opposes that conclusion. Both *Williams* cases arose under sentencing procedures which, unlike Florida's present bifurcated-trial scheme, required no new finding of fact to support the imposition of a death sentence upon a defendant convicted of first-degree murder. They were thus distinguished in *Specht v. Patterson*, 386 U.S. 605, 608 (1967), and are similarly distinguishable here. And neither *Williams* case involved a constitutional issue relating to non-disclosure.

> "Although several courts, including our own, two leading commentators and the Advisory Committee [on the Federal Criminal Rules] have read Williams v. New York . . . as holding that the failure to disclose the contents of a presentence report to a defendant involves no violation of due process . . . , the issue was not presented in that case, as the Court itself explicitly recognized, 337 U.S. . . . at 252 n.18 . . . since the contents of the report there in question had been fully disclosed to the defendant in open court.[41] Because of this disclosure, the case was decided solely under the Confrontation Clause of the Sixth Amendment. This was also the conclusion reached in ABA Standards, [*supra* note 22] . . . , at 224. Similarly, in Williams v. Oklahoma . . . , another case sometimes cited for the proposition that due process does not require disclosure of any part of a presentence report, disclosure was not at issue since the unsworn incriminating statements by the prosecutor at the time of sentencing was made in the presence of the defendant who acknowledged the truth of the charges being made.[42]

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[41] *See Williams v. New York, supra*, 337 U.S. at 244, 252.

[42] *See Williams v. Oklahoma, supra*, 358 U.S. at 579-584.

"The only Supreme Court case which could be read as approving a fixed policy of nondisclosure is Specht v. Patterson. . . . In that case, Justice Douglas, writing for the majority, characterized Williams v. New York in dicta[43] as holding that due process does not require judges 'to have hearings and to give a convicted person an opportunity to participate in those hearings when he came to determine the sentence to be imposed.' [386 U.S.] . . . at 606. . . . Justice Douglas, whose strong views favoring mandatory disclosure are well known . . . , immediately went on, however, to indicate that the real issue in *Williams* was the use of out-of-court statements at sentencing and not the propriety of their disclosure."

United States v. Picard, 464 F.2d 215, 218-219 n.4 (CA1 1972).

We add one point. Since *Furman v. Georgia, supra*, it is no longer true that "the judge here [could have] . . . sentenced [petitioner] . . . to death giving no reason at all." *Williams v. New York, supra*, 337 U.S. at 252. The thrust of this Court's death penalty decisions of July 2, 1976, is to approve[44] and demand[45] a

[43] There is also a dictum in *Gregg v. United States*, 394 U.S. 489, 492 (1969), that "[p]resentence reports are documents which [Fed. Rule Crim. Pro. 32] . . . does not make available to the defendant as a matter of right." But *Gregg* presented no issue of disclosure under either Rule 32 (which was amended in 1975 and now *does* require disclosure as a matter of right, *see* Appendix B *infra*) or under the Constitution.

[44] *Gregg v. Georgia, supra*, 44 U.S.L.W. at 5243, 5246 (opinion of Mr. Justice Stewart, Mr. Justice Powell, and Mr. Justice Stevens, announcing the judgment of the Court).

[45] *Woodson v. North Carolina, supra*, 44 U.S.L.W. at 5274 (opinion of Mr. Justice Stewart, Mr. Justice Powell, and Mr. Justice Stevens, announcing the judgment of the Court); *Roberts v. Louisiana, supra*, 44 U.S.L.W. at 5283-5284 (opinion of Mr. Justice Stewart, Mr. Justice Powell, and Mr. Justice Stevens, announcing the judgment of the Court).

capital-sentencing procedure that "requires the trial judge to focus on the circumstances of the crime and the character of the individual defendant," *Proffitt v. Florida, supra*, 44 U.S.L.W. at 5259 (opinion of Mr. Justice Stewart, Mr. Justice Powell, and Mr. Justice Stevens, announcing the judgment of the Court), by conducting "an informed, focused, guided, and objective inquiry into the question whether [the sentence shall be] . . . death," *id.* at 5261. It makes a mockery of this process to deny the defendant notice and an opportunity to respond to information which is the subject of the "focus," and simultaneously to strip the record of the necessary factual predicate for informed review of his death sentence by the Florida Supreme Court and this Court.

B. The Court Has and Should Exercise Jurisdiction to Hear and Decide the Question Presented

The question whether the trial judge properly considered the presentence report without disclosing part of it to petitioner was raised in petitioner's Assignments of Error to the Florida Supreme Court (A. 148), and in petitioner's briefs in that court. *See* pp. 27-29 *supra*. Petitioner emphasized that "[t]he confidential portion of the report is not in the record, and neither appellant nor his counsel can examine that portion of the report," Reply Brief of the Appellant in *Daniel Wilbur Gardner v. State of Florida*, Fla. Sup. Ct. No. 45106, at 20. Two dissenting Justices below accordingly concluded that the undisclosed portion of the presentence report was "absolutely unknown to and

therefore unrebuttable by Appellant," and that this non-disclosure was "fundamental error" requiring the reversal of petitioner's death sentence. *Gardner v. State*, 313 So.2d 675, 678 (Fla. 1975). However, since the Florida Supreme Court's opinion affirming petitioner's conviction is brief and elliptical, *see* pp. 11-12 *supra*, and since "it will be assumed that the omission [of explicit consideration of a federal constitutional question in the opinion of a state appellate court] was due to want of proper presentation in the state courts, unless the aggrieved party in this Court can affirmatively show the contrary," *Street v. New York*, 394 U.S. 576, 582 (1969); *see also Hartford Life Ins. Co. v. Johnson*, 249 U.S. 490, 493 (1919), it becomes necessary to consider whether petitioner's failure to object to non-disclosure at trial, and the opacity of the record as to whether the Florida Supreme Court considered this issue as a federal constitutional claim on appeal, foreclose this Court's consideration of the claim. We submit that the Court has and should exercise jurisdiction to determine the claim.

In capital cases, the Florida Supreme Court has a settled practice, established by its rules and recognized in its precedents, of considering *all* significant prejudicial errors, whether a contemporaneous objection was made or not, which its independent review of the record reveals. "[I]n appeals where the death penalty has been imposed, we feel it our duty to overlook technical niceties in the interest of justice," *Wells v. State*, 98 So.2d 795, 801 (Fla. 1957). Florida Appellate

Rule 6.16,[46] which the court below cited in its majority and dissenting opinions, *Gardner v. State, supra*, 313 So.2d at 676-677, 677 (A. 151, 152), authorizes the court "in its discretion, if it deems the interests of justice to require, [to] review any other things said or done in the cause [to which no objection had been raised] which appear in the appeal record" (Rule 16.6(a)), and also, in the case of a "defendant who has been sentenced to death . . . [to] review the evidence to determine if the interests of justice require a new trial" (Rule 16.6(b)). Rule 3.7(i), Fla. R. App. P. (1976 spec.

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[46] Rule 6.16, Fla. R. App. P. (1976 spec. pamphlet), in its entirety provides:

"*Scope of Review*

a. *Generally.* Upon an appeal by either the state or the defendant the appellate court shall review all rulings and orders appearing in the appeal record insofar as it is necessary to do so in order to pass upon the grounds of appeal. The court shall also review all instructions to which an objection was made and which are alleged as a ground of appeal, and the sentence when there is an appeal therefrom. The court may also in its discretion, if it deems the interests of justice to require, review any other things said or done in the cause which appear in the appeal record, including instructions to the jury. The reception of evidence to which no objection was made shall not be construed to constitute a ruling by the court.

b. *Sufficiency of Evidence.* Upon an appeal by the defendant from the judgment the appellate court shall review the evidence to determine if it is insufficient to support the judgment where this is a ground of appeal. Upon an appeal from the judgment by a defendant who has been sentenced to death the appellate court shall review the evidence to determine if the interests of justice require a new trial, whether the insufficiency of the evidence is a ground of appeal or not."

Rule 6.16 is derived from and identical to former Fla. Stat. Ann. §924.32 (Comp. Gen. Laws Supp. 1940).

pamphlet), provides that "the Court, in the interest of justice, may notice jurisdictional or fundamental error apparent in the record-on-appeal, whether or not it has been argued in the briefs or made the subject of an assignment of error, or of an objection or exception in the court below." *See Henderson v. State*, 155 Fla. 487, 20 So.2d 649, 651 (1945); *Sanford v. Rubin*, 237 So.2d 134, 137 (Fla. 1970); *Palm Beach County v. Green*, 179 So.2d 356, 362-363 (Fla. 1965).

The Florida Supreme Court has liberally construed these rules to consider errors in death cases where no contemporaneous objection was raised at trial or where no assignment of error was made on appeal. The court has asserted its "responsibility and obligation . . . to deal cautiously with judgments imposing the extreme penalty," *Williams v. State*, 117 So.2d 473, 476 (Fla. 1960), since "[t]here is absolute finality in an executed sentence of death," *Wells v. State, supra*, 98 So.2d at 801. An exceptionally careful independent scrutiny of the record for error is exercised in capital cases because "errors which could make the difference between life and death can hardly be deemed harmless and trivial." *Pait v. State*, 112 So.2d 380, 386 (Fla. 1959). *See also Raulerson v. State*, 102 So.2d 281, 286 (Fla. 1958); *Coley v. State*, 185 So.2d 472, 474, 476 (Fla. 1966). The court has frequently indicated that it has surveyed the record for *all* error;[47] and it has reversed a number

[47] *See, e.g., Baker v. State*, 241 So.2d 683, 687 (Fla. 1970); *Alvord v. State*, 322 So.2d 533, 541 (Fla. 1975); *Miller v. State*, 332 So.2d 65, 68 (Fla. 1976). *And see Burnette v. State*, 151 So.2d 9, 10 (Fla. 1963) (case remanded so full record could be prepared to enable the court "to discharge the duties and responsibilities [of comprehensively reviewing the record in a capital case] imposed upon us by the laws of this State and required by our own rules.") In *Burnette v. State*, 157 So.2d 65, 67 (Fla. 1963), the court emphasized: *(continued)*

of capital convictions for error that was not objected to at trial[48] or assigned as error on appeal.[49]

Recently, in vacating a death sentence and remanding for resentencing in *LaMadline v. State*, 303 So.2d 17 (Fla. 1974), the court emphasized that it does not presume waiver where a death-sentenced defendant at trial fails affirmatively to request "an essential" procedural right in capital sentencing proceedings (specifically in *LaMadline*, the right to have a jury make an advisory sentencing recommendation after a guilty plea to a capital charge):

(footnote continued from preceding page)

> "[t]he rules of this Court and the statutes of this State provide that in causes of this nature this Court may in its discretion, if it deems the interests of justice to so require, review anything said or done in the cause which appears in the appeal record, including instructions to the jury, whether or not exception is taken thereto at the time. While this rule and the statute have not been applied in all instances, it has been closely and strictly adhered to in cases where the supreme penalty has been imposed by the judgment under review."

[48] *See Anderson v. State*, 276 So.2d 17, 19 (Fla. 1973); *Singer v. State*, 109 So.2d 7, 28 (Fla. 1959); *Wells v. State*, 98 So.2d 795, 801 (Fla. 1957); *Bennett v. State*, 127 Fla. 759, 173 So. 817, 819 (1937); *Harrison v. State*, 149 Fla. 365, 5 So.2d 703, 707 (1942); *Grant v. State*, 194 So.2d 612, 613 n.1, 616 (Fla. 1967); *Pait v. State*, 112 So.2d 380, 384-386 (Fla. 1959); *Burnette v. State*, 157 So.2d 65, 67 (Fla. 1963). *Cf. State v. Jones*, 204 So.2d 515, 518-519 (Fla. 1967) (first degree murder conviction where sentence of life imprisonment imposed).

[49] *Wells v. State, supra*, 98 So.2d at 801-802 (alternative ground); *Williams v. State*, 117 So.2d 473, 476 (Fla. 1960) (dictum); *Bennett v. State, supra*, 173 So. at 819-820 (alternative ground); *Pait v. State, supra*, 112 So.2d at 386 (alternative ground).

> "[t]his is an essential right of the defendant under our death penalty legislation, though it may be waived. The question before this Court is whether the appellant has waived this right. We cannot presume a waiver where the record is silent, Boykin v. Alabama, supra [395 U.S. 238 (1969)]; Carnley v. Cochran, 369 U.S. 506, 82 S.Ct. 884, 8 L.Ed.2d 70 (1962); and the failure to either object or request the jury sentencing procedure cannot constitute such a waiver. We hold that the record must affirmatively show that the defendant voluntarily and intelligently waived the right to have a sentencing jury render its opinion on the appropriateness of the death penalty . . . This record reflects no such waiver."

LaMadline v. State, supra, 303 So.2d at 20. And in *Songer v. State*, 322 So.2d 480 (Fla. 1975), the court decided (albeit adversely) a claim that a death-sentencing judge had improperly considered a pre-sentence investigation report, notwithstanding that no contemporaneous objection was made in the trial court:

> "[a]s for Appellant's objection to the trial court's consideration of the presentence investigation report, we find no error in that consideration. . . . We observe that Appellant did not object to such consideration and that he received a copy of the PSI and had the opportunity to rebut it prior to sentencing."[50]

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[50] The Florida Supreme Court did ignore the fact that part of the PSI had *not* been disclosed to appellant Songer (*see* Record on Appeal in *Carl Ray Songer v. State of Florida*, Fla. Sup. Ct. No. 45106, at 485) and that this was the basis of Appellant Songer's Assignment of Error No. 10 to the trial judge's "considering [of] the pre-sentence investigation of defendant." (The trial judge in Songer was also the Hon. John W. Booth, *see* p. 26, *supra*). The *Songer* case is pending in this Court on petition for certiorari, *Songer v. Florida*, No. 75-5800, and presents the same question raised in the present case.

Songer v. State, supra, 322 So.2d at 484.

Certainly, the consitutional contention that the sentencing judge should not have considered the presentence investigation report while withholding a portion of it from petitioner was raised with less than perfect exactness in petitioner's Assignments of Error and in his briefs in the Florida Supreme Court. However, his complaint about the use of the undisclosed portion of the PSI in sentencing him to death was reiterated several times in varying forms in sections of the briefs developing the relevant Assignments of Error, *see* pp. 27-29 *supra*, and any question regarding the adequacy of this presentation should be resolved in his favor for several reasons.

First, "[i]n death cases doubts . . . should be resolved in favor of the accused." *Andres v. United States*, 333 U.S. 740, 752 (1948). "The taking of life is irrevocable. It is in capital cases especially that the balance of conflicting interests must be weighted most heavily in favor of the procedural safeguards of the Bill of Rights." *Reid v. Covert*, 354 U.S. 1, 45-46 (1957) (concurring opinion of Justice Frankfurter). *See also Stein v. New York*, 346 U.S. 156, 196 (1953); *Williams v. Georgia*, 349 U.S. 375, 391 (1955); *Reid v. Covert, supra*, 354 U.S. at 77-78 (concurring opinion of Justice Harlan).

Second, the record establishes that petitioner clearly intended, however inartfully, to invoke the Due Process Clause in challenging the trial court's consideration of the undisclosed portion of the PSI report before sentencing him to death. This Court has refused to take a restrictive view of the manner in which due process claims may be raised and preserved below, even in

non-capital cases.[51] In *Braniff Airways v. Nebraska State Board*, 347 U.S. 590 (1954), for example, the appellant had relied "upon the Commerce Clause on [the] . . . issue [of the constitutionality of a state tax] and . . . not specifically claim[ed] protection under the Due Process Clause of the Fourteenth Amendment." *Id.* at 598. However, the Court noted that appellant timely raised and preserved its contention that its property was not taxable because such property had attained no taxable situs in Nebraska. "Though inexplicit, we consider the due process issue within the clear intendment of such contention and hold such issue sufficiently presented." *Id.* at 598-599.[52]

> "There are various ways in which the validity of a state statute may be drawn in question on the ground that it is repugnant to the Constitution of

[51] *See, e.g., Stanley v. Illinois*, 405 U.S. 645, 658 n.10 (1972); *Gibbs v. Burke*, 337 U.S. 773, 779 (1949); *Dyke v. Taylor Implement Mfg. Co.*, 391 U.S. 216, 217 n.3 (1968); *Kaukauna Water Power Co. v. Green Bay & Miss. Canal Co.*, 142 U.S. 254, 269-271 (1891); *Murray v. Charleston*, 96 U.S. 432, 440-441 (1878); *Spencer v. Merchant*, 125 U.S. 345, 352 (1888).

[52] Insofar as petitioner's constitutional claim relies upon the recognition in *Woodson v. North Carolina, supra*, 44 U.S.L.W. at 5275, of the "qualitatively different" "heed for reliability in the determination that death is the appropriate punishment in a specific case," that decision was, of course, not available to petitioner at trial or on appeal. This Court has recognized that "mere failure . . . [to raise a claim] prior to the announcement of a decision which might support it cannot prevent a litigant from later invoking such a ground." *Curtis Publishing Co. v. Butts*, 388 U.S. 130, 143 (1967). *See O'Connor v. Ohio*, 385 U.S. 92 (1966); *Smith v. Yeager*, 393 U.S. 122, 126 (1968); *and see Maxwell v. Bishop*, 398 U.S. 262 (1970) (applying *Witherspoon v. Illinois*, 391 U.S. 510 (1968)).

> the United States. No particular form of words or phrases is essential, but only that the claim of invalidity and the ground therefor be brought to the attention of the state court with fair precision and in due time. And if *the record as a whole* shows either expressly or by clear intendment that this was done, the claim is to be regarded as having been adequately presented."

New York ex rel. Bryant v. Zimmerman, 278 U.S. 63, 67 (1928) (footnote omitted) (emphasis added). *See also Street v. New York*, 394 U.S. 576, 584-585 (1969).

Third, Boykin v. Alabama, 395 U.S. 238 (1969), is directly controlling here. Indeed, in that capital case, the Court acknowledged that the federal constitutional issue on which Boykin's conviction was reversed had been interjected into the case when, "[o]n their own motion . . . four of the seven justices [of the Alabama Supreme Court] discussed the constitutionality of the process by which the trial judge had accepted petitioner's guilty plea." *Id.* at 240.[53] Three of those justices had voted to reach and resolve the issue in Boykin's favor; the fourth had said only that on the record (where no contemporaneous objection appeared) he would not " 'presume that the trial judge had failed to do his duty,' " *id.* at 241, under a proper constitutional standard. The prevailing plurality of the

[53] Justice Harlan's dissenting opinion also notes that "[o]n his appeal to the Alabama Supreme Court, petitioner did not claim that his guilty plea was made involuntarily or without full knowledge of the consequences." *Id.* at 246. Justice Harlan agreed, however, "that we do have jurisdiction to consider the question." *Id.* at 246 n.2.

Alabama Supreme Court in *Boykin* had–like the *per curiam* opinion below here–not discussed the issue. However, in both cases, the majorities of the respective state supreme courts could hardly have failed to understand the nature of the issues discussed by their dissenting brethren; and, in this setting, the Court held that the "error [of accepting Boykin's guilty pleas], under Alabama procedure, was properly before the court below," *id.* at 242, because of Alabama's appellate review rules in death cases:

> "[t]he very Alabama statute . . . that provides automatic appeal in capital cases also requires the reviewing court to comb the record for 'any error prejudicial to the appellant, even though not called to our attention in brief of counsel' . . . The automatic appeal statute 'is the only provision under the Plain Error doctrine of which we are aware in Alabama criminal appellate review.' . . . In the words of the Alabama Supreme Court:
>
> > 'Perhaps it is well to note that in reviewing a death case under the automatic appeal statute, . . . we may consider any testimony that was seriously prejudicial to the rights of the appellant and may reverse thereon, even though no lawful objection or exception was made thereto. . . . Our review is not limited to the matters brought to our attention in brief of counsel.' "

395 U.S. at 241-242. Florida's rules of review in death cases are, as we have noted above, precisely the same as Alabama's in this regard.

Finally, Rule 40(1)(d)(2) provides that this Court, "at its option, may notice a plain error not presented." The discretion conferred under this Rule "has been long acknowledged . . . , recently affirmed, . . . and extends

to review of the trial court record." *Vachon v. New Hampshire*, 414 U.S. 478, 479 n.3 (1974). *See also Brown v. Mississippi*, 297 U.S. 278, 286-287 (1936); *Terminiello v. Chicago*, 337 U.S. 1, 8-9 (1949) (dissenting opinion of Justice Frankfurter). Exercise of the Court's discretion is appropriate in the present case because the factual claim that the trial court erred by considering the presentence investigation report was clearly presented below (whatever the imprecision of its legal articulation); because the dissenting opinion below considered the claim (although admittedly in terms of "fundamental error" without explicit reference to the source of law which established the error); because the majority of the Florida Supreme Court discussed *no* specific issues in its *per curiam* opinion and can therefore hardly be thought to have passed this issue over silently for inadequacy in its presentation; and because the issue is of widespread and crucial importance as "the Florida [supreme] court has ruled that [a Florida trial judge] . . . may order preparation of a presentence investigation report to assist him in determining the appropriate sentence . . . [and t]hese reports frequently contain much information relevant to sentencing," *Proffitt v. Florida, supra*, 44 U.S.L.W. at 5259 n.9. As the Court has noted concerning the predecessor of Rule 40(1)(d)(2):

> "this rule is not a rigid one, and we have less reluctance to disregard prior examples in criminal cases than in civil cases, and less reluctance to act under it when rights are asserted which are of such high character as to find expression and sanction in the Constitution or Bill of Rights."

Weems v. United States, 217 U.S. 349, 362 (1910).

IX.

CONCLUSION

The judgment of the Supreme Court of Florida should be reversed insofar as it affirms petitioner's sentence.

Respectfully submitted,

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APPENDIX A: DISCLOSURE OF PRESENTENCE REPORTS IN THE STATE COURTS

The statutes, rules of court or common law doctrines[1] of thirty-six States[2] entitle the defense to some degree of mandatory disclosure of presentence or probation reports. Seventeen States[3] provide for mandatory disclosure of all portions of such reports which a judge may use in felony sentencing; nineteen States[4] make some provision for the withholding of certain

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[1] Because a number of States have moved toward some form of mandatory disclosure of presentence or probation reports within the past four years, *see* pp. 58-60 *supra*, the analysis contained in Annot., *Defendant's Right to Disclosure of Presentence Report*, 40 A.L.R.3d 681 (1971) is somewhat dated. The Annotation also notes that "[s]tate statutory law and court rules are not represented herein except as they are reflected in the decision of the courts in the reported cases, and no attempt is made herein to reflect the current statutory law or court rules of any particular jurisdiction." 40 A.L.R.3d at 684.

[2] Alabama, Alaska, Arizona, Arkansas, California, Colorado, Connecticut, Georgia, Hawaii, Idaho, Illinois, Indiana, Kansas, Kentucky, Maine, Maryland, Massachusetts, Michigan, Minnesota, Nevada, New Hampshire, New Jersey, New Mexico, New York, North Carolina, North Dakota, Ohio (rule applies only to "aggravated murder" convictions), Oklahoma, Oregon, Pennsylvania, South Carolina, Utah, Virginia, Washington, Wisconsin, Wyoming.

[3] Alabama, California, Colorado, Connecticut, Hawaii, Idaho, Illinois, Kansas, Maryland, New Jersey, New Mexico, North Carolina, Ohio (rule applies only to "aggravated murder" convictions), South Carolina, Utah, Virginia, Wyoming.

[4] Alaska, Arizona, Arkansas, Indiana, Georgia, Kentucky, Maine, Massachusetts, Michigan, Minnesota, Nevada, New Hampshire, New York, North Dakota, Oklahoma, Oregon, Pennsylvania, Washington, Wisconsin.

kinds of sentencing information, but in nine of these States,[5] the judge must either summarize the factual information withheld,[6] or state for the record his reasons for withholding.[7] There are considerable variations among the States as to when such reports are required and what they may contain. A summary of the law of each State with regard to disclosure of pre-sentence and probation reports follows.

ALABAMA

Probation officers "shall investigate all cases referred to [them] . . . for investigation by any court." Ala. Code tit. 42, §23 (1959). The report of such officers is frequently referred to as a "pre-sentence report," *Moore v. State*, 54 Ala. App. 463, 309 So.2d 500, 501 (1975). The officers' reports "shall be privileged and shall not be available for public inspection except upon order of the court to which the same was referred," but "in no case shall the right to inspect said report be denied the defendant or his counsel after said report has been completed or filed." Ala. Code tit. 42, §23 (1959).

ALASKA

Alaska Stat., R. Crim. P. 32(c)(2) (1975 supp.) provides:

[5] Alaska, Arizona, Indiana, Kentucky, New York, North Dakota, Oklahoma, Oregon, Washington.

[6] Indiana, Kentucky, North Dakota, Oklahoma, Washington.

[7] Alaska, Arizona, New York, Oregon.

> "*Report.* The report of the pre-sentence investigation shall contain any prior criminal conviction including a finding of delinquency of the defendant and such information about his characteristics, his financial condition, and the circumstances affecting his behavior as may be helpful in imposing sentence or in granting probation or in the correctional treatment of the defendant, and such other information as may be required by the court. No record of arrest or other police contacts shall be included in the report. The report shall be made available to the state's attorney and to the defendant's attorney in all cases and to the defendant unless the court enters on the record findings of reasons why the report would prove detrimental to the rehabilitation of the defendant or safety of the public."

The mandatory disclosure requirement was added in 1974; the prior rule contained no provision relating to disclosure. *See* Alaska Stat., R. Crim. P. 32(c)(2) (1966).

ARIZONA

Ariz. Rev. Stat. Ann., R. Crim. P. 26.4(a) (1975 supp.) provides that "[t]he court shall require a pre-sentence report in all cases in which it has discretion over the penalty to be imposed [except where the penalty is under one year's imprisonment or where a pre-sentence report is already available.]"

In 1972, the Arizona Supreme Court overruled earlier decisions holding that disclosure of the pre-sentence report was within the discretion of the trial court, and adopted rules providing for mandatory disclosure with certain exceptions. *See State v. Pierce*, 108 Ariz. 174,

494 P.2d 696 (1972). Ariz. Rev. Stat. Ann., R. Crim. P. 26(6)(a) (1975 supp.) now provides generally that:

> "[t]he court shall permit the prosecutor and defense counsel, or if he is without counsel, the defendant, to inspect all pre-sentence, diagnostic and mental health reports. A portion of any report not made available to one party shall not be made available to any other."

Disclosure must be made at least two days before the sentencing hearing. Rule 26.6(b) (1975 supp.). However, excision of three kinds of information is permitted:

> "[t]he court may excise from the copy of the pre-sentence, diagnostic and mental health reports disclosed to the parties:
>
> (1) Diagnostic opinions which may seriously disrupt a program of rehabilitation,
>
> (2) Sources of information obtained on a promise of confidentiality, and
>
> (3) Information which would disrupt an existing police investigation.
>
> When a portion of the pre-sentence report is not disclosed, the court shall inform the parties and shall state on the record its reasons for making the excision."

Rule 26.6(c) (1975 Supp.). The next subsection of the Rule provides: "[t]he unexcised reports shall be made available to a reviewing court when a relevant issue has been raised and to a court sentencing the defendant after a subsequent conviction." Rule 26.6(d) (1975 Supp.). Rule 26.6(c) originally provided that "[t]he summary and recommendations of the probation officer" could be excised, but in 1975, the provision allowing nondisclosure of this information was deleted from the Rule.

ARKANSAS

In 1975, Arkansas enacted a statute providing for the mandatory disclosure of the "factual contents and conclusions" of pre-sentence investigation reports except for "[c]onfidential sources of information":

> "*Pre-sentence investigation.*—(1) If punishment is fixed by the court, the court may order a pre-sentence investigation before imposing sentence.
>
> (2) The pre-sentence investigation should be conducted by a pre-sentence officer or other person designated by the court and should include an analysis of the circumstances surrounding the commission of the offense, the defendant's history of delinquency or criminality, physical and mental condition, family situation and background, economic status, education, occupation, personal habits, and any other matters that the investigator deems relevant or the court directs to be included.
>
> (3) Before imposing sentence, the court may order the defendant to submit to psychiatric examination and evaluation for a period not to exceed thirty (30) days. The defendant may be remanded for this purpose to the State Hospital or the court may appoint a qualified psychiatrist to make the examination and evaluation.
>
> (4) Before imposing sentence, the court shall advise the defendant or his counsel of the factual contents and conclusions of any pre-sentence investigation or psychiatric examination and afford fair opportunity, if the defendant so requests, to controvert them. Sources of confidential information need not be disclosed.
>
> (5) If the defendant is sentenced to imprisonment, a copy of the report of any pre-sentence investigation or psychiatric examination shall be transmitted forthwith to the Department of Correction or, when the defendant is committed to

the custody of a specific institution, to that institution."

Ark. Stat. 1947 Ann. §41-804 (1975 spec. pamphlet).

CALIFORNIA

Cal. Penal Code §1203.10 (1970) provides that a trial judge may direct the county probation officer to "inquire into the antecedents, character, history, family environment and offense" of a defendant. The probation officer "must report the same to the court and file his report in writing in the records of said court." (*Ibid.*) Cal. Penal Code §1203d (1970) provides that "[n]o court shall pronounce judgment upon any defendant . . . [as to whom a §1203.10 probation report has been ordered] unless a copy of the probation report has been made available to the court, the prosecuting attorney, and the defendant or his attorney, at least two days or, upon the request of the defendant, five days prior to the time fixed by the court for consideration of the report with respect to pronouncement of judgment." This section also requires the probation report to be filed with the clerk as part of the record in the case. *See also* Cal. Penal Code §1203 (1976 supp.); Cal. Civ. P. Code §§131.3, 131.5 (1976 supp.).

COLORADO

Colo. Rev. Stat. Ann., R. Crim. P. 32(a)(1) (1974) provides that "[i]n any felony case where the court has discretion as to the punishment and on court order in any misdemeanor case, the probation officer shall make

an investigation and written report to the court before the imposition of sentence or granting of probation."

> "The report of the presentence or probation investigation shall state, in addition to any other information required by the court, the defendant's prior criminal record and such information about his characteristics, his financial condition, and the circumstances affecting his behavior as may be helpful in imposing sentence, in granting probation, or in correctional treatment."

Rule 32(a)(2). In 1974, the Colorado Supreme Court adopted a mandatory disclosure rule covering the entire presentence investigation report: "[c]opies of the presentence report including any recommendations as to probation shall be furnished to the prosecuting attorney and defense counsel." Rule 32(a)(2). An identical full-disclosure provision is contained in Colo. Rev. Stat. Ann. §16-11-102(1) (1974).

CONNECTICUT

Conn. Gen. Stat. Ann. §54-109a (1976 supp.) provides that "in any case wherein a presentence investigation is ordered, without a showing of good cause, the court shall provide the defendant or his attorney with a copy of the presentence investigation report at least twenty-four hours prior to the date set for sentencing and . . . shall hear motions addressed to the accuracy of any part of such . . . report." Conn. Gen. Stat. Ann. §53a-46a(c) (1976 supp.) provides:

> "[i]n such hearing [to determine sentence for first degree murder] the court shall disclose to the defendant or his counsel all material contained in any presentence report which may have been

prepared. No presentence information withheld from the defendant shall be considered in determining the existence or nonexistence of any of the factors [in aggravation and mitigation] set forth in subsection (f) or (g)."

DELAWARE

Del. Code Ann. tit. 11, §4322(a) (1975) provides:

> "[t]he presentence report (other than a presentence report prepared for the Superior Court or the Court of Common Pleas), the preparole report, the supervision history, and all other case records obtained in the discharge of official duty by any member or employee of the Department shall be privileged and shall not be disclosed directly or indirectly to anyone other than . . . [certain state agencies] except that the court may, in its discretion, permit the inspection of the report or parts thereof by the offender or his attorney or other persons who in the judgment of the court have a proper interest therein, whenever the best interest of the State or welfare of a particular defendant or person makes such action desirable or helpful. . . . The presentence reports prepared for the Superior Court and the Court of Common Pleas shall be under the control of those courts respectively."

Practice in the Superior Court and the Court of Common Pleas is apparently governed by *State v. Moore*, 49 Del. 29, 108 A.2d 675, 680 (1954), in which the Delaware Supreme Court ruled that a defendant was entitled to see his presentence report only if he could demonstrate "unusual circumstances or reasons to justify" disclosure.

FLORIDA

See pp. 6-8 *supra*.

GEORGIA

Ga. Code Ann. §27-2710 (1972) provides:

> "[i]t shall be the duty of the circuit probation supervisor to investigate all cases referred to him by the court and to make his findings and report thereon in writing to such court with his recommendation. The superior court may require, before imposition of sentence, a presentence investigation and written report in each felony case in which the defendant has entered a plea of guilty, nolo contendere or been convicted."

Disclosure generally is governed by the rule of *Munsford v. State*, 235 Ga. 38, 218 S.E.2d 792, 798 (1975) (non-capital case) that "if a pre-sentence report contains any matter adverse to the defendant and likely influence the decision to suspend or probate the sentence, it should be revealed to defense counsel by the trial judge in advance of the pre-sentence hearing to give the accused an opportunity for explanation or rebuttal." Ga. Code Ann. §27-2503(a) (1975 supp.) provides that at the sentencing hearing in a capital case, "only such evidence in aggravation as the State has made known to the defendant prior to his trial shall be admissible."

HAWAII

The Hawaii Penal Code of 1972, c.6, §604(2) (Hawaii Sess. Laws 1972, art. 9, p. 71) provides:

> "[t]he Court shall furnish to the defendant or his counsel and to the prosecuting attorney a copy of the report of any presentence diagnosis or psychiatric or other medical examination and afford fair opportunity, if the defendant or the prosecuting attorney so requests, to controvert or supplement them."

See State v. Martin, 56 Hawaii Adv. 5671, 535 P.2d 127, 128 (1975); *State v. Nobriga*, 56 Hawaii 75, 527 P.2d 1269, 1272-1273 (1974).

IDAHO

Idaho Code §19-2515 (1948) provides:

> "[a]fter a plea or verdict of guilty, where a discretion is conferred upon the court as to the extent of the punishment, the court, upon the oral suggestion of either party that there are circumstances which may be properly taken into view either in aggravation or mitigation of the punishment, may, in its discretion, hear the same summarily, at a specified time, and upon such notice to the adverse party as it may direct."

Idaho Code §19-2516 (1948) provides:

> "[t]he circumstances must be presented by the testimony of witnesses examined in open court, except that when a witness is so sick or infirm as to be unable to attend, his deposition may be taken by a magistrate of the county, out of court, upon such notice to the adverse party as the court

> may direct. No affidavit or testimony, or representation of any kind verbal or written, can be offered to or received by the court, or a judge thereof, in aggravation or mitigation of the punishment, except as provided in this and the preceding section."

The entire presentence report must be disclosed whenever it is used by the trial court as a basis for imposing sentence. Whenever "such a report is used by the trial judge as the basis for determining the sentence imposed, or where it might otherwise influence the court in arriving at a sentence, full disclosure of the contents of such report must be made prior to any hearing on the sentence . . . in aggravation or mitigation of punishment in order to comply with the requirements of our statutes [§§19-2515, 19-2516]." *State v. Rolfe*, 92 Idaho 467, 444 P.2d 428, 434 (1968) (sentence vacated because presentence report not disclosed).

(Where a defendant has applied for probation, however, the rules of disclosure are not so stringent. "[T]he trial judge has discretion as to whether the full contents of the pre-sentence report [will] be disclosed to the defendant at the hearing on his application for probation. Where the trial judge chooses not to disclose the report, he is obligated, however, to give the defendant sufficient information concerning adverse matters contained therein so the defendant may be in a position to offer intelligent refutation." *State v. Rolfe, supra*, 444 P.2d at 433-434.)

ILLINOIS

Ill. Ann. Stat. c.38, §1005-3-1 (Smith-Hurd 1973) provides that "[a] defendant shall not be sentenced

before a written presentence report of investigation is presented to and considered by the court where the defendant is convicted of a felony." The contents of such a report are prescribed by Ill. Ann. Stat. c.38, §1005-3-2. In 1972, Illinois enacted Ill. Ann. Stat. c.38, §1005-3-4(b)(2) (Smith-Hurd 1973) which provides for mandatory, full disclosure of presentence reports and abandons the former Illinois rule that such disclosure was within the discretion of the trial court (*see People v. Forman*, 108 Ill. App.2d 482, 247 N.E.2d 917 (1969); *People v. Stroup*, 96 Ill. App.2d 315, 239 N.E.2d 1 (1968)). Presentence reports "shall be open for inspection . . . to the state's attorney and the defendant's attorney at least 3 days prior to the imposition of sentence."

INDIANA

Ind. Code. Ann. §35-8-1A-9 (1975) provides "[n]o defendant convicted of a felony shall be sentenced before a written presentence report is prepared by a probation officer and considered by the sentencing court." Ind. Code Ann. §35-8-1A-10 (1975) prescribes the contents of the presentence report. Provisions for disclosure were added in 1973; the trial court must either give the defendant the presentence report itself or its "factual contents and conclusions":

> "[b]efore imposing sentence, the court shall:
> (1) advise the convicted person or his counsel and the prosecuting attorney of the factual contents and conclusions of the presentence investigation; or
> (2) provide the convicted person or his counsel and the prosecuting attorney with a copy of the presentence report.

> The sources of confidential information need not be disclosed. The court shall furnish the factual contents of the presentence investigation or a copy of the presentence report sufficiently in advance of sentencing so that the convicted person will be afforded a fair opportunity to controvert the materials contained therein."

Ind. Code Ann. §35-8-1A-13 (1975).

IOWA

In Iowa, upon any criminal conviction, "the court shall receive from the state and from the defendant any information which may be offered which is relevant to the question of sentencing"; and in felony cases, the trial court must also order a presentence investigation to be made. Iowa Code Ann. §789A.3 (1976 supp.). The contents of the presentence report are described in Iowa Code Ann. §789A.4 (1976 supp.). Disclosure of the presentence report is committed to the discretion of the trial court:

> "[t]he court may, in its discretion, make the presentence investigation report or parts of it available to the defendant, or the court may make the report of it available while concealing the identity of the person who provided confidential information. The report of any medical examination or psychiatric evaluation shall be made available to the attorney for the state and to the defendant upon request. Such reports shall be part of the record but shall be sealed and opened only on order of the court."

Iowa Code Ann. §789A.5 (1976 supp.). *See also State v. Waterman*, ____ Iowa ____, 217 N.W.2d 621, 624 (1974) ("In the present state of the law there is no

constitutional right to inspection of the presentence report. However, . . . it may be desirable, and in the future constitutionally necessary, to allow examination of the report.")

KANSAS

Kan. Stat. Ann. §21-4604 (1974) provides that a trial judge may order a presentence investigation and report "[w]henever a defendant is convicted of a crime or offense." In 1973, Kansas provided for full mandatory disclosure of presentence reports to defense counsel. Kan. Stat. Ann. §21-4605 (1974) now provides:

> "*Availability of report to defendant and others.* The judge shall make available the presentence report, any report that may be received from the diagnostic center, and other diagnostic reports to the attorney for the state and to the counsel for the defendant when requested by them, or either of them. Such reports shall be part of the record but shall be sealed and opened only on order of the court."

KENTUCKY

In 1974, Kentucky made a presentence report mandatory for sentencing in all "conviction[s] of a felony, other than a capital offense." Ky. Rev. Stat. Ann. §532.050(1) (1975). The court must advise the defendant of the "factual contents and conclusions" of the report:

> "[b]efore imposing sentence, the court shall advise the defendant or his counsel of the factual contents and conclusions of any presentence investigation or psychiatric examinations and afford a fair opportunity and a reasonable period of time, if the defendant so requests, to controvert them. The sources of confidential information need not, however, be disclosed."

Ky. Rev. Stat. Ann. §532.050(4) (1975). Ky. Rev. Stat. Ann., R. Crim. P. 11.02 (1972) further provides that "[b]efore imposing sentence the court shall afford the defendant and his counsel an opportunity to make a statement or statements in the defendant's behalf and, if the sentence is fixed by the court, to present any information in mitigation of punishment."

LOUISIANA

La. Code Crim. Proc., art. 875(A) (1976 supp.) authorizes (but does not require) a court, after a defendant is convicted "of an offense other than a capital offense", to order a presentence report from the Department of Corrections, Division of Probation and Parole. La. Code Crim. Proc., art. 877 (1967) provides:

> "[t]he pre-sentence or post-sentence investigation report shall be privileged and shall not be disclosed directly or indirectly to anyone other than the sentencing court, members of the division of probation and parole supervision, the officer in charge of the institution to which the defendant is committed, the parole board, the probation or the parole officer if the defendant is placed on probation or released on parole, medical authorities if the defendant is committed to a hospital, the pardon board, and the governor or his representative.

> Before imposing sentence the court may advise the defendant or his counsel of the factual contents and conclusions of any pre-sentence investigation report. The sources of confidential information shall not, however, be disclosed."

See State v. Hamilton, 312 So.2d 656 (La. 1975).

MAINE

A pre-sentence investigation report may be ordered at the discretion of the trial court, Me. Rev. Stat. Ann., R. Crim. P. 32(c)(1) (1975 spec. pamphlet). Rule 32(c)(2) provides:

> "*Report.* The report of the pre-sentence investigation shall contain any prior criminal record of the defendant and such information on his characteristics, his financial condition, and the circumstances affecting his behavior as may be helpful in imposing sentence or in granting probation or in the correctional treatment of the defendant, and such other information as may be required by the court. If the defendant is represented by counsel, the court before imposing sentence shall permit counsel for the defendant to read the report of the pre-sentence investigation or to be present at the presentation of an oral report and shall afford such counsel an opportunity to comment thereon. If the defendant is not represented by counsel, the court shall communicate, or have communicated to the defendant the essential facts in the report of the pre-sentence investigation and shall afford the defendant an opportunity to comment thereon. Confidential sources of information may be excluded from any report which counsel is permitted to read, which is presented in counsel's presence, or the essential facts of which are communicated to the defendant."

MARYLAND

In 1972, Maryland abandoned the rule that disclosure of presentence investigation reports was discretionary with the trial court (*see Costello v. State*, 237 Md. 464, 206 A.2d 812 (1965)) by enacting Md. Ann. Code art. 41, §124(b) (1975 cum. supp.):

> "[t]he presentence reports shall be made available, upon request, to the defendant's attorney and the State's attorney's office."

Defense counsel is now entitled to the presentence report "as of right." *Haynes v. State*, 19 Md. App. 428, 311 A.2d 822, 824-825 (1973).

MASSACHUSETTS

In Massachusetts, the disclosure of information in a probation report relating to prior convictions is mandatory, while disclosure of information relating to other facets of the defendant's character is discretionary (although the Supreme Judicial Court has stated that, under this discretion, disclosure should be liberally authorized). Mass. Gen. Laws. Ann. ch.276, §85 (1976 supp.) authorizes the probation officer to prepare a report on previous convictions of the defendant: "such record of the probation officer shall be made available to the defendant and his counsel for inspection." Mass. Gen. Laws Ann. ch.279, §4A (1976 supp.) contains a similar provision, authorizing a trial judge to receive such information (and mandating disclosure). However, probation officers are authorized to collect other information on criminal defendants by Mass. Gen. Laws Ann. ch.276, §100 (1976 supp.) (though the nature of

this information is not statutorily defined), and disclosure of this kind of information in a presentence report is discretionary with the court:

> "[b]ut in holding that disclosure under G.L. c.276, §100, is discretionary, we think that a word should be said concerning the exercise of such discretion . . . '[T]he authority granted the sentencing judge . . . to disclose material in the presentence investigation report and to give the defendant or his counsel an opportunity to comment on it should [not] be exercised conservatively and in a niggardly fashion. . . . [T]he administration of justice would be improved by a liberal and generous use of the power to disclose. The main consideration against full disclosure is the prospect that the revelation of certain material given the probation officer in confidence, would result in the destruction of the sources of such material and its availability—a consequence which would be highly prejudicial to the difficult task of imposing a proper sentence. But where the material in no wise relates to such a confidential declaration, there would appear to be little reason not to disclose what has been reported to the sentencing judge. This is a matter, however, which must rest in his sound discretion.' "

Commonwealth v. Martin, 355 Mass. 296, 244 N.E.2d 303, 307-308 (1969).

MICHIGAN

In Michigan, presentence reports are required in all felony cases. Mich. Comp. Laws Ann. §771.14 (1968). In 1973, the Michigan Supreme Court adopted a rule of general disclosure of presentence reports with certain limited exceptions. Michigan General Court Rule 785.12 (1975 spec. pamphlet) provides:

> "*Presentence Reports.* The sentencing court shall permit the defendant's attorney, or if he is not represented by counsel, the defendant to inspect the presentence report. The prosecution shall also be shown the report. Both parties shall be given an opportunity at time of sentencing to respond to the presentence report and to explain or controvert any factual representations disclosed. The court may except from disclosure parts of the report which are not relevant to a proper sentence, diagnostic opinion which might seriously disrupt a program of rehabilitation, or sources of information which have been obtained on a promise of confidentiality. In all cases where parts of the report are not disclosed under such authority, the court shall state for the record the reasons for its action and inform the defendant and his attorney that information has not been disclosed. The action of the court in excepting information from disclosure shall be subject to appellate review."

See also People v. McFarlin, 389 Mich. 557, 208 N.W.2d 504, 514 (1973).

MINNESOTA

In Minnesota, a presentence report may be ordered by the trial court in any case where a defendant has been convicted of a crime for which life imprisonment is not required. Minn. Stat. Ann., R. Crim. P. 27.02(1) (1976 spec. pamphlet). There is mandatory disclosure of the entire presentence report, except that "confidential sources of information" may but need not be disclosed. Rule 27.02(3) (1976 spec. pamphlet) provides:

> "[s]ubject to the limitations of Minn. Stat. §609.115, subd. 4, a copy of the presentence

> report, if written, shall be provided to counsel for all parties before sentence. Otherwise, the presentence report shall be subject to disclosure only as provided by law. If the presentence report is given orally, the defendant or his attorney shall be permitted to hear the report."

Minn. Stat. Ann. §609.115(4). (1964), in turn, provides:

> "[a]ny report made pursuant to subdivision 1 of this section shall be open to inspection by the prosecuting attorney and the defendant's attorney prior to sentence and on the request of either of them a summary hearing in chambers shall be held on any matter brought in issue, but confidential sources of information shall not be disclosed unless the court otherwise directs."

The Rules also outline the manner in which the presentence report may be used at the sentencing hearing:

> "[s]ummary hearings upon the presentence report and upon the sentence to be imposed upon the defendant shall be held as provided by law. Before the sentencing proceeding, each party shall notify the opposing party and the court of any part of a written presentence report which he intends to controvert by the production of evidence. Both the prosecutor and the defendant or his attorney shall have an opportunity to controvert any part of an oral presentence report and for such purpose the court may continue the sentencing."

Rule 27.03(1) (1976 spec. pamphlet). *See also State v. Tellock*, 273 Minn. 394, 142 N.W.2d 64 (1966).

MISSISSIPPI

The Mississippi Corrections Act of 1976, Miss. Gen. Acts. 1976, c. 440, p. 1 (adv. sheet no. 6), effective July 1, 1976, creates a Division of Community Services within the Department of Corrections, whose personnel are empowered to "investigate all cases referred to them for investigation . . . by any court in which they are authorized to serve." Chap. 440, §81 (enacting amended Miss. Code 1972 §47-7-9(2)(a)). Moreover,

> "[s]eparate division personnel (hereinafter presentence investigators) shall be provided to perform investigation for the court as provided in this subsection. Presentence investigators shall conduct presentence investigations on all persons convicted of a felony in any circuit court of the state, prior to sentencing and at the request of the circuit court judge of the court of conviction. The presentence evaluation report shall consist of a complete record of the offender's criminal history, educational level, employment history, psychological condition and such other information as the department or judge may deem necessary."

Chap. 440, §81 (enacting amended Miss. Code 1972 §47-7-9(3)(a)). The Corrections Act does not address the question of disclosure of presentence reports. The new Act transfers supervision of probationers from the Probation and Parole Board to the Department of Corrections (Chap. 440, §88 (enacting amended Miss. Code §47-7-33)) (*cf.* Miss. Code 1972 Ann. §47-7-33 (1973)), so it is unclear whether the confidentiality provisions of Miss. Code 1972 Ann. §47-7-21 (1973) which apply to employees of the Probation and Parole Board (§47-7-21 provides that all information gathered by Board employees is "privileged and shall not be disclosed directly or indirectly to any one other than to

the board, the judge or others entitled under this chapter to receive such information unless and until otherwise directed by such board or judge") continue to apply to the probation reports prepared by the Department.

MISSOURI

Missouri provides that presentence reports may be ordered at the discretion of the trial court (*see State v. Maloney*, 434 S.W.2d 487, 496 (Mo. 1968)) but the relevant Rule of Criminal Procedure is silent as to disclosure of the reports to the defense:

> "[w]hen a probation officer is available to any court having original jurisdiction to try felony cases and to the St. Louis Court of Criminal Correction, such probation officer shall, unless otherwise directed by the court, make a presentence investigation and report to the court before the imposition of sentence or the granting of probation. The report shall not be submitted to the court or its contents disclosed to anyone unless the defendant has pleaded guilty or has been found guilty. The report of the presentence investigation shall contain any prior criminal record of the defendant and such information about his characteristics, his financial condition, his social history and the circumstances affecting his behavior as may be helpful in imposing sentence or in granting probation or in the correctional treatment of the defendant. The probation officer shall secure such other information as may be required by the court and, whenever it is practicable, such investigation shall include a physical and mental examination of the defendant."

Mo. R. Crim. P. 27.07(b) (1976 Mo. R. Ct. Pamphlet). There appear to be no precedents governing a defendant's right to disclosure, but it is clear that such disclosure has occurred in Missouri (*see, e.g., Griffith v. State*, 504 S.W.2d 323, 329 (Mo. App. 1974)) where the Missouri Court of Appeals noted that defense counsel had reviewed the presentence report).

MONTANA

Mont. Rev. Codes Ann. §95-2203 (1969) provides that a presentence investigation shall be conducted by a probation officer in all cases where a defendant is convicted of a crime which may result in a prison term of one year or more "unless the court deems such report unnecessary." Mont. Rev. Codes Ann. §95-2205 (1969) provides:

> "[t]he judge may, in his discretion, make the investigation report or parts of it available to the defendant or others, while concealing the identity of persons who provided confidential information. If the court discloses the identity of persons who provided information, the judge may, in his discretion, allow the defendant to cross-examine those who rendered information. Such reports shall be part of the record but shall be sealed and opened only on order of the court."

Cf. Kuhl v. District Court, 139 Mont. 536, 366 P.2d 347, 363-365 (1961).

NEBRASKA

Neb. Rev. Stat. §29-2261(5) (1975 repl.) provides:

> "[a]ny presentence report or psychiatric examination shall be privileged and shall not be disclosed directly or indirectly to anyone other than a judge, probation officers to whom an offender's file is duly transferred, or others entitled by law to receive such information. The court may permit inspection of the report or examination of parts thereof by the offender or his attorney, or other person having a proper interest therein, whenever the court finds it in the best interest of a particular offender. The court may allow fair opportunity for an offender to provide additional information for the court's consideration."

In *State v. Richter*, 191 Neb. 34, 214 N.W.2d 16 (1974), the Nebraska Supreme Court held that it was error for the trial court to refuse disclosure of the portion of the presentence report dealing with prior arrests:

> "[t]he statutory provision codifies a rule of discretion in the trial court. . . . The District Court possesses a discretion, but no good reason comes to mind for denying defendant or his attorney access to that part of the report which notes any prior record of arrests and convictions. Should the court grant access to the report or part of it, the court at the request of defendant may hold an in camera hearing."

The defendant has a right to examine the presentence report *after* sentencing, however, and provision is made for including the report in the record on appeal:

> "[i]n all cases where a presentence report may be material on appeal, the defendant, his counsel, or counsel for the State may request the sentencing judge to forward it to the Clerk of the Supreme Court. In each instance, the sentencing judge shall forward it with the record to the Clerk in a separate sealed envelope. The defendant, his counsel, or counsel for the State may examine the report but it may not be removed from the office of the Clerk."

Neb. Rev. Stat., Neb. Sup. Ct. R. 7(h) (1974 spec. pamphlet).

NEVADA

In Nevada, the preparation of a presentence investigation report by the Probation Service of the district court is mandatory in every criminal case. Nev. Rev. Stat. §176.135 (1975).

> "1. The court shall disclose to the district attorney, to counsel for the defendant and to the defendant, the factual content of the report of the presentence investigation and the recommendations of the probation service and afford an opportunity to each party to comment thereon.
> 2. The sources of confidential information shall not be disclosed."

Nev. Rev. Stat. §176.156 (1975).

NEW HAMPSHIRE

In New Hampshire, a presentence investigation is mandatory before sentencing for a felony, unless it is waived by the defendant and the State. "The report shall include a recommendation as to disposition, together with reference to such material disclosed by

the investigation as supports such recommendation." N.H. Rev. Stat. Ann. §651:4(I) (1974 repl.). Disclosure of the "factual contents" of the presentence report is mandatory, and defendant must be afforded a fair opportunity to controvert them; the sources of confidential information "need not" be disclosed. N.H. Rev. Stat. Ann. §651:4(II) (1975 supp.) provides:

> "[b]efore imposing sentence, the court shall take such steps as may be necessary so that the defendant is advised, by his counsel, or otherwise, as the situation warrants, of the factual contents of any presentence investigation, and afforded a fair opportunity to controvert them. The sources of confidential information need not, however, be disclosed."

NEW JERSEY

In New Jersey, the trial judge must disclose to the defendant *all* "material having any bearing whatever on sentence" contained in the presentence report.

> "Before the imposition of a sentence or the granting of probation the probation service of the court shall make a presentence investigation and report to the court. The report shall be first examined by the sentencing judge so that matters not to be considered by him in sentencing may be excluded. The report, thus edited, shall contain all presentence material having any bearing whatever on the sentence and shall be furnished to the defendant. If a custodial sentence is imposed, the probation service of the court shall, within 10 days thereafter, transmit a copy of the presentence report to the person in charge of the institution to which the defendant is committed."

N.J. Rev. Stat. Ann., R. Crim. Prac. 3:21-2 (1975). This Rule substantially broadens the disclosure requirements of *State v. Kunz*, 55 N.J. 128, 259 A.2d 895 (1969) wherein the court permitted discretionary withholding of "confidential sources" and "diagnostic matters which would be harmful to the defendant's rehabilitation if he were told about them," 259 A.2d at 903-904.

NEW MEXICO

As of Sept. 1, 1975, New Mexico has moved to a rule of mandatory full disclosure of the "predisposition report." Prior to this date, N. Mex. Stat. Ann. §40A-29-15 (1972) authorized the trial court to order an investigative report after conviction of a defendant "of any crime not constituting a capital or first degree felony," and N. Mex. Stat. Ann. §41-17-23 (1972) defined the contents of the report but was silent as to disclosure. N. Mex. Stat. Ann. §41-23-56 (1975 supp.), enacting R. Crim. P. 56, effective Sept. 1, 1975, provides:

> "Rule 56—*Predisposition report procedure*
>
> (a) Ordering the Report. The court may order a predisposition report at any stage of the proceedings.
>
> (b) Inspection. The report shall be available for inspection by only the parties and attorneys by the date specified by the district court, and in any event, no later than two [2] working days prior to any hearing at which a sentence may be imposed by the court.
>
> (c) Hearing. Before a sentence is imposed, the parties shall have an opportunity to be heard on any matter concerning the report. The court, in its discretion, may allow the parties to present evidence regarding the contents of the report."

NEW YORK

In 1975, New York enacted N.Y. Crim. Proc. L. §390.50 (1975-1976 supp.) providing mandatory disclosure of the presentence report, subject to certain exceptions:

> "*Confidentiality of pre-sentence reports and memoranda*
> 1. In general. Any pre-sentence report or memorandum submitted to the court pursuant to this article and any medical, psychiatric or social agency report or other information gathered for the court by a probation department, or submitted directly to the court, in connection with the question of sentence is confidential and may not be made available to any person or public or private agency except where specifically required or permitted by statute or upon specific authorization of the court.
> 2. Presentence report; disclosure; general principles. The presentence report or memorandum shall be made available by the court for examination by the defendant's attorney, or the defendant himself, if he has no attorney, in which event the prosecutor shall also be permitted to examine the report or memorandum. In its discretion, the court may except from disclosure a part or parts of the report or memoranda which are not relevant to a proper sentence, or a diagnostic opinion which might seriously disrupt a program of rehabilitation, or sources of information which have been obtained on a promise of confidentiality, or any other portion thereof, disclosure of which would not be in the interest of justice. In all cases where a part or parts of the report or memoranda are not disclosed, the court shall state for the record that a part or parts of the report or memoranda have been excepted and the reasons for its action. The action of the court excepting information from disclosure shall be subject to appellate review."

See People v. Perry, 36 N.Y.2d 114, 365 N.Y.S.2d 518, 324 N.E.2d 875 (1975). Prior to 1975, disclosure of the report had been left to the discretion of the trial court. *See, e.g., People v. Peace*, 18 N.Y.2d 230, 273 N.Y.S.2d 64, 219 N.E.2d 419 (1966).

NORTH CAROLINA

In 1967, North Carolina moved to a rule of full mandatory disclosure of presentence diagnostic reports. *See* N.C. Laws 1967, c. 996, §2. N.C. Gen. Stat. §148-12(b) (1974 repl.) now provides:

> "[a] copy of the diagnostic study report shall be made available to defense counsel before the court pronounces sentence. The defendant shall be afforded fair opportunity to controvert the contents of the report, if he so requests."

Previously, the rule in North Carolina has been that the trial court had discretion to disclose or not disclose presentence reports. *State v. Pope*, 257 N.C. 326, 126 S.E.2d 126, 133 (1962).

NORTH DAKOTA

N.D. Cent. Code, R. Crim. P. 32(c)(1) (1974) provides that the trial court may order a presentence investigation at its discretion. Rule 32(c)(3) provides that the report of this investigation "shall" be disclosed unless it contains "information which if disclosed would be harmful to the defendant or other persons; in such case, the trial judge "shall state orally or in writing a summary of the factual information contained therein to be relied on in determining sentence":

"*Disclosure.*
(i) Before imposing sentence the court shall permit the defendant, and his counsel if he is so represented, to read the report of the presentence investigation unless in the opinion of the court the report contains information which if disclosed would be harmful to the defendant or other persons; and the court shall afford the defendant or his counsel an opportunity to comment thereon.
(ii) If the court is of the view that there is information in the presentence report, disclosure of which would be harmful to the defendant or to other persons, the court in lieu of making the report or part thereof available shall state orally or in writing a summary of the factual information contained therein to be relied on in determining sentence, and shall give the defendant or his counsel an opportunity to comment thereon. The statement may be made to the parties in camera.
(iii) Any material disclosed to the defendant or his counsel shall also be disclosed to the prosecuting attorney.
(iv) Any copies of the presentence investigation report made available to the defendant or his counsel and the prosecuting attorney shall be returned to the court immediately following the imposition of sentence or the granting of probation. Copies of the presentence investigation report shall not be made by the defendant, his counsel, or the prosecuting attorney."

See also N.D. Cent. Code §12-59-04 (1976 repl.).

OHIO

The rule of *State v. Vance*, 117 Ohio App. 169, 191 N.E.2d 737 (1962), providing for mandatory disclosure of presentence reports, governs capital cases, while Ohio Rev. Code Ann., tit. 29, R. Crim. P. 32.2(A) (1975)

governs non-capital cases and authorizes disclosure at the discretion of the court. Rule 32.2(A) provides:

"(1) Except in cases of aggravated murder committed on and after January 1, 1974, the report of the presentence investigation shall be confidential and need not be furnished to the defendant or his counsel or the prosecuting attorney unless the court, in its discretion, so orders.
(2) Any material disclosed to the defendant or his counsel shall also be disclosed to the prosecuting attorney.
(3) Any copies of the presentence investigation report made available to the defendant or his counsel and the prosecuting attorney shall be returned to the court, probation officer or investigator immediately following the imposition of sentence or the granting of probation. Copies of the presentence investigation report shall not be made by the defendant, his counsel, or the prosecuting attorney."

OKLAHOMA

In 1975, Oklahoma moved to a rule of mandatory disclosure of "the factual contents and the conclusions of any presentence investigation."

"*Presentence investigation*
Whenever a person is convicted of a felony except when the death sentence is imposed, the court shall, before imposing sentence to commit any felon to incarceration by the Department of Corrections, order a presentence investigation to be made by the Division of Probation and Parole of the Department. The Division shall thereupon inquire into the circumstances of the offense, and the criminal record, social history and present condition of the convicted person; and shall make

a report of such investigation to the court, including a recommendation as to appropriate sentence, and specifically a recommendation for or against probation. Such reports must be presented to the judge so requesting, within a reasonable time, and upon the failure to so present the same, the judge may proceed with sentencing. Whenever, in the opinion the court or the Division, it is desirable, the investigation shall include a physical and mental examination of the convicted person. The reports so received shall not be referred to, or be considered, in any appeal proceedings. Before imposing sentence, the court shall advise the defendant or his counsel and the district attorney of the factual contents and the conclusions of any presentence investigation or psychiatric examination and afford fair opportunity, if the defendant so requests, to controvert them. If either the defendant or the district attorney desires, such hearing shall be ordered by the court providing either party an opportunity to offer evidence proving or disproving any finding contained in such report, which shall be a hearing in mitigation or aggravation of punishment.

If the district attorney and the defendant desire to waive such presentence investigation and report, both shall execute a suitable waiver subject to approval of the court, whereupon the judge shall proceed with the sentencing."

Okla. Stat. Ann. tit. 22, §982 (1975-1976 supp.). Previously, the statute was silent as to disclosure. *See* Okla. Stat. Ann. tit. 57, §519 (1969).

OREGON

In 1973, Oregon provided for mandatory disclosure of the presentence report, with certain exceptions. Ore. Rev. Stat. §137.079 (1975) now provides:

"*Presentence report; disclosure to parties; court's authority to except parts from disclosure.* (1) A copy of the presentence report shall be made available to the district attorney, the defendant or his counsel a reasonable time before the sentencing of the defendant.

(2) The court may except from disclosure parts of the presentence report which are not relevant to a proper sentence, diagnostic opinions which might seriously disrupt a program of rehabilitation if known by the defendant, or sources of information which were obtainable only on a promise of confidentiality.

(3) If parts of the presentence report are not disclosed under subsection (2) of this section, the court shall inform the parties that information has not been disclosed and shall state for the record the reasons for the court's action. The action of the court in excepting information shall be reviewable on appeal."

See also Ore. Rev. Stat. 137.077 (1975). Previously, the rule in Oregon had been that the trial judge had discretion to disclose or not disclose the presentence report. *See* Ore. Rev. Stat. §137.090 (1971); *Buchea v. Sullivan*, 262 Ore. 222, 497 P.2d 1169 (1972).

PENNSYLVANIA

In 1973, by judicial decision, *Commonwealth v. Phelps*, 450 Pa. 597, 301 A.2d 678 (1973), and by promulgation of a rule of criminal procedure, Pa. Stat. Ann., R. Crim. P. 1404 (1976 spec. pamphlet), Pennsylvania moved to a rule of mandatory inspection of the presentence report, subject only to the trial court's power to "impose conditions of confidentiality." Rule 1404 provides:

"(a) All psychiatric and pre-sentence reports shall be confidential records. They shall be available only to:

(1) the sentencing judge;

(2) the attorney for the Commonwealth and counsel for the defendant, for inspection only, on conditions stated by the sentencing judge, provided that counsel shall not be supplied with copies of such reports unless ordered by the sentencing judge, but counsel shall be given the opportunity to comment thereon before the imposition of sentence;

(3) on the order of the sentencing judge, persons or agencies having a legitimate professional interest in the disposition of the instant case, including:

(i) a physician or psychiatrist appointed to assist the court in sentencing;

(ii) an examining faculty;

(iii) a correctional institution;

(iv) a department of probation or parole.

(b) The sentencing judge may impose conditions of confidentiality consistent with this Rule."

See also Commonwealth v. Burton, 451 Pa. 12, 301 A.2d 675, 677 (1973).

RHODE ISLAND

In Rhode Island, a presentence report must be made in every case in which a sentence of imprisonment for more than one year may be imposed except where the prescribed punishment is death or life imprisonment. Super. Ct. R. Crim. P. 32(c)(1) (1972 spec. pamphlet). *See also* R.I. Gen. Laws Ann. §12-19-6 (1974 supp.).

Under Super. Ct. R. Crim. P. 32(c)(2) (1972 spec. pamphlet), the trial court "may" disclose "all or part" of the presentence report to defendant:

"[t]he report of the presentence investigation shall contain any prior criminal record of the defendant and such information about his characteristics, his financial condition and the circumstances affecting his behavior as may be helpful in imposing or deferring sentence or in granting probation or in the correctional treatment of the defendant, and such other information as may be required by the court. A copy of the report shall be furnished to the Attorney General to aid him in making a recommendation to the court concerning the sentence to be imposed. The court before imposing sentence may disclose to the defendant or his counsel all or part of the material contained in the report of the presentence investigation and afford an opportunity to the defendant or his counsel to comment thereon."

This Rule was adopted in 1972. The Official Comment to the Rule states that:

"Although this provision does not require the Court to furnish the defendant or his counsel with the report, the court is authorized to make all or any part of it available. To assure the accuracy of the information relied upon in sentencing, the court may, whenever feasible, make the report available to defendant or his counsel. See *State v. Kunz*, 55 N.J. 129 (1969) (holding that as a matter of "rudimentary fairness" defendants in New Jersey are entitled to disclosure of presentence reports, with appropriate excisions to protect confidential sources or matters harmful to the defendant's rehabilitation and to an opportunity to comment on prejudicial material contained therein prior to sentencing). See also ABA, Standards Relating to Sentencing Alternatives and Procedures, pp. 213-225 (approved draft 1968)."

SOUTH CAROLINA

No statutes or rules authorize presentence investigations. South Carolina law is clear that all evidence upon which a sentence is based be presented in open court to insure the defendant's right of confrontation and cross-examination. "Where the liberty of a defendant is concerned and he is to be sentenced by the judge, he has a right that everything appertaining to the case, in the way of evidence affecting the case, be open and above board and public." *State v. Harvey*, 128 S.C. 447, 123 S.E. 201, 203 (1924) (case remanded for resentencing where trial court had discussed sentencing of defendant *in camera* with solicitor alone). *Accord: State v. Simms*, 131 S.C. 420, 127 S.E. 840 (1925) (case remanded for resentencing where trial court pronounced sentence based upon what citizens had told him in chambers about the defendant); *State v. Bodie*, 213 S.C. 325, 49 S.E.2d 575, 577 (1948) (trial court properly disavowed reliance on hearsay statements before he sentenced defendant). *See also State v. Brandon*, 210 S.C. 495, 43 S.E.2d 449, 453-454 (1947) (on petition for rehearing).

SOUTH DAKOTA

The statute authorizing the preparation of a presentence report, S.D. Comp. Laws Ann. §23-48-18 (1967) provides:

> "[s]uch report shall be privileged and confidential except for the use thereof by the court and the board [of pardons and parole] in the disposition of the case in which made. It shall not thereafter be used against the defendant in any other action.

> If filed in the case such report shall be enclosed in a sealed envelope with a notation thereof that it shall not be opened except by order of the court."

In *State v. Robinson*, ____ S. Dak. ____ 209 N.W.2d 374 (1974), the South Dakota Supreme Court ruled that a trial court had discretion to disclose the report to the defense, and could allow the defendant to refute it by submitting information, 209 N.W.2d at 378. In *State v. Hanson*, ____ S. Dak. ____, 215 N.W.2d 130 (1974), the Court held that nondisclosure of a presentence report because of confidential sources in it was within the discretion of the trial court. The Court encouraged judges to be liberal in making disclosure, however:

> "[a]s an officer of the court the defense attorney is capable of observing the confidentiality required and this disclosure would foreclose the possibility of any inaccuracy of a serious nature in the report."

215 N.W.2d at 134.

TENNESSEE

Preparation of a report by a probation officer is required before a defendant may be placed on probation:

> "*Investigation and report by probation and paroles officer—Supervision of parolee.*—The power of suspension and probation is within the sole discretion of the trial judge; however, when a probation and paroles officer is available to the court, no defendant shall be placed on probation until a written report of investigation by a probation and paroles officer shall have been presented to and

considered by the court, provided the probation and paroles officer to whom such matter has been referred shall file his report within ten (10) days after such reference. Said report shall inquire into the circumstances of the offense, criminal record, social history, and present condition of the defendant. Whenever the trial judge deems it desirable, such investigation shall include a physical and mental examination of the defendant, the expense of which shall be adjudged as part of the costs. All persons released on probation shall be subject to the direct supervision of the board of pardons and paroles, and each such probationer must report as directed to his probation and paroles officer until released from supervision. No probationer shall be allowed to leave the jurisdiction of his probation and paroles officer without the express permission of the trial judge."

Tenn. Code Ann. §40-2904 (1975 repl.). Such a report is occasionally referred to as a "pre-sentence investigation." *Stiller v. State*, ____ Tenn. ____, 516 S.W.2d 617, 618 (1974). There are no provisions in the Tennessee Code governing disclosure of the report, and there are apparently no cases which directly address this question. However, the practice in Tennessee seems to be that defense counsel receive copies of the probation report: *see, e.g., Stiller v. State, supra*, 516 S.W.2d at 622, where the Tennessee Supreme Court disapproved the practice of defense counsel's attaching a copy of the report to his brief.

TEXAS

Vern. Tex. C. Crim. P. Ann., art. 42.12, §4 (1966) provides:

"[w]hen directed by the court, a probation officer shall fully investigate and report to the court in writing the circumstances of the offense, criminal record, social history and present condition of the defendant. Whenever practicable, such investigation shall include a physical and mental examination of the defendant. If a defendant is committed to an institution, the probation officer shall send a report of such investigation to the institution at the time of commitment."

Disclosure of the presentence report is in the discretion of the trial court. *See Rodriguez v. State*, 502 S.W.2d 13, 14-15 (Tex. Cr. App. 1973).

UTAH

Utah's 1973 statute authorizing presentence "studies" conducted by the Division of Corrections contains a mandatory disclosure provision. Utah Code Ann. §76-3-404 (1975 supp.) provides:

"*Pre-sentence investigation—Commitment of defendant—Sentencing procedure.*—(1) In felony cases where the court is of the opinion that imprisonment may be appropriate but desires more detailed information as a basis for determining the sentence to be imposed than has been provided by the pre-sentence report, the court may, in its discretion, commit a convicted defendant to the custody of the division of corrections for a period not exceeding ninety days. The division of corrections shall conduct a complete study of the defendant during that time, inquiring into such matters as the defendant's previous delinquency or criminal experience, his social background, his capabilities, his mental, emotional and physical health, and the rehabilitative resources or programs which may be

available to suit his needs. By the expiration of the period of commitment, or by the expiration of the additional time as the court shall grant, not exceeding a further period of ninety days, the defendant shall be returned to the court for sentencing, and the court, prosecutor, and the defendant or his attorney shall be provided with a written report of results of the study, including whatever recommendations the division of corrections believes will be helpful to a proper resolution of the case. After receiving the report and recommendations, the court shall proceed to sentence a defendant in accordance with the sentencing alternatives provided under section 76-3-201."

The "presentence report" prepared by probation officers appears to be disclosable at the discretion of the trial court. *See State v. Doremus*, 29 Utah2d 373, 510 P.2d 529 (1973); *State v. Dowell*, 30 Utah2d 323, 517 P.2d 1016 (1974).

VERMONT

A trial court has discretion to disclose the presentence report to the defendant "whenever the best interest or welfare of the defendant . . . makes that action desirable or helpful":

"[a]ny presentence report, pre-parole report, or supervision history prepared by any employee of the department in the discharge of his official duty, is privileged and shall not be disclosed to anyone outside the department other than the judge or the parole board, except that the court or board may in its discretion permit the inspection of the report or parts thereof by the state's attorney, the defendant or inmate or his attorney,

or other persons having a proper interest therein, whenever the best interest or welfare of the defendant or inmate makes that action desirable or helpful."

Vt. Stat. Ann. tit. 28 §204(d) (1975 cum. supp.). *See also State v. Morse*, 126 Vt. 314, 229 A.2d 232 (1967); *In re Shuttle*, 131 Vt. 457, 306 A.2d 667 (1973).

VIRGINIA

The Virginia rule is mandatory disclosure of the full presentence report. A defendant is entitled to receive the report five days before it is presented by the probation officer in open court subject to cross-examination.

"*Investigations by probation officers in certain cases.*—When a person is tried upon a felony charge, and is adjudged guilty of such charge, the court may, or on the motion of the defendant shall, before imposing sentence direct a probation officer of such court to thoroughly investigate and report upon the history of the accused and any and all other relevant facts, to the end that the court may be fully advised as to the appropriate and just sentence to be imposed. The probation officer, after having made same available to counsel for the accused by furnishing him with a copy of same for his permanent use at least five days prior thereto, shall present his report in open court in the presence of the accused who shall have been advised of the contents of the same and be given the right to cross-examine the investigating officer as to any matter contained therein and to present any additional facts bearing upon the matter which he may desire to present. The report of the investigating officer shall be filed as a part of the record in the case."

Va. Code §19.2-299 (1975 repl.). Failure to afford defendant the right to cross-examine and present evidence is reversible error. *Linton v. Commonwealth*, 192 Va. 437, 65 S.E.2d 534 (1951).

WASHINGTON

With the promulgation of its superior court rules in 1973, Washington adopted a rule of mandatory disclosure except where revelation of information in the presentence report "would be harmful to the defendant or to other persons." Wash. Super. Ct. R. Crim. P. 7.2(c) (1975 spec. pamphlet) provides:

> "(1) Before imposing sentence, the court shall permit the defendant to read the report of the presentence investigation unless in the opinion of the court the report contains information which if disclosed would be harmful to the defendant or other persons; and the court shall afford the defendant or his counsel an opportunity for comment or rebuttal.
>
> (2) If the court is of the view that there is information in the presentence report, disclosure of which would be harmful to the defendant or to other persons, the court in lieu of making the report or part thereof available shall state orally or in writing a summary of the factual information contained therein to be relied on in determining sentence, and shall give the defendant or his counsel an opportunity for comment or rebuttal. The statement may be made to the parties *in camera*."

WEST VIRGINIA

W. Va. Code Ann. §62-12-7 (1966) provides for the preparation of probation reports in the case of "any prospective probationer":

> "[w]hen directed by the court, the probation officer shall make a careful investigation of, and a written report with recommendations concerning, any prospective probationer. Insofar as practicable this report shall include information concerning the offender's court and criminal record, occupation, family background, education, habits and associations, mental and physical condition, the names, relationship, ages and condition of those dependent upon him for support, and such other facts as may aid the court in determining the propriety and conditions of his release on probation. No person convicted of felony shall be released on probation until this report shall have been presented to and considered by the court. The court may in its discretion request such a report concerning any person convicted of a misdemeanor. A copy of all reports shall be filed with the board of probation and parole."

There do not appear to be any statutes, rules, or decisions governing the question of disclosure of such reports. A 1967 study found that in half of West Virginia's courts, such reports were routinely disclosed to defense counsel; in the remainder, such reports were "rarely" or "never" disclosed. Lowensen, *The Disclosure to Defense of Presentence Reports in West Virginia*, 63 W.VA. L. REV. 159, 161-163 (1967).

WISCONSIN

Presentence reports must be disclosed to a defendant, except that the identity of persons providing informa-

tion for the report may be concealed. Wis. Stat. Ann. §972.15 (1971) provides:

> "(1) After conviction the court may order a presentence investigation.
>
> (2) When a presentence investigation report has been received, the judge shall disclose the contents of the report to the defendant's attorney and to the district attorney prior to sentencing. When the defendant is not represented by an attorney, the contents shall be disclosed to the defendant.
>
> (3) The judge may conceal the identity of any person who provided information in the presentence investigation report.
>
> (4) After sentencing, unless otherwise ordered by the court, the presentence investigation report shall be confidential and shall not be made available to any person except upon specific authorization of the court."

WYOMING

In Wyoming, the probation service of the court "shall make a presentence investigation and report to the court before the imposition of sentence . . . unless the court otherwise directs." Wyo. Stat. Ann., R. Crim. P. 33(c)(1) (1975 supp.). Rule 33(c)(2) provides:

> "[t]he court, before imposing sentence, shall disclose to the defendant or his counsel all of the material contained in the report of the presentence investigation and afford an opportunity to the defendant or his counsel to comment thereon. The material disclosed to the defendant or his counsel shall also be disclosed to the attorney for the State."

APPENDIX B: DISCLOSURE OF PRESENTENCE REPORTS IN THE FEDERAL COURTS

In federal criminal prosecutions, disclosure of presentence reports is governed by Rule 32(c) of the Federal Rules of Criminal Procedure. Prior to its most recent amendment in 1975, Rule 32(c) provided only that the trial court "may" disclose all or part of the presentence report.[1b] However, in the framework of

[1b]The draft of Rule 32 submitted by the Advisory Committee to the Supreme Court in 1940 contained a provision that the presentence report should be made available to the attorneys for the parties and such other persons as the court might designate. *See* C. WRIGHT, FEDERAL PRACTICE AND PROCEDURE: CRIMINAL §524 (1969). This provision was deleted from the rules as adopted by the Court in 1946, and thus the original Rule 32 made no reference to the question of disclosure. There are few reported cases on disclosure prior to the 1966 amendment of the Rule, and the issue was apparently treated as a matter of discretion for the trial court. *Compare Smith v. United States*, 223 F.2d 750, 757 (CA 1955), *rev'd on other grounds*, 360 U.S. 1 (1958); *Stephan v. United States*, 133 F.2d 87, 100 (CA6 1943); *with United States v. Durham*, 181 F.Supp. 503, 503-504 (D.D.C. 1960).

Rule 32(c) was amended in 1966 to provide in subsection (2) that "[t]he court before imposing sentence may disclose to the defendant or his counsel all or part of the material contained in the report of the presentence investigation and afford an opportunity to the defendant or his counsel to comment thereon." Since it was generally assumed that courts already had this power, the amendment made no change in federal law. But the Advisory Committee noted in its commentary that, by spelling out this discretionary power, "[i]t [was] . . . hoped that courts [would] . . . make increasing use of their discretion to disclose so that defendants generally [would] . . . be given full opportunity to rebut or explain facts in presentence reports which [are] . . . material factors in determining sentences." 1966 Advisory Committee Note to Proposed Rule 32(c)(2), Federal Rules of Criminal Procedure, 39 F.R.D. 193, 194 (1966).

this apparently neutral language, the federal circuits were remarkably uniform in declaring that disclosure was the preferred practice.[2b] Moreover, the Courts of Appeals fashioned several rules that effectively restricted the procedures or the circumstances under which a denial of disclosure would be sustained as a proper exercise of discretion.[3b]

[2b]*See Morano v. United States*, 374 F.2d 583, 585-586 (CA1 1967); *United States v. Fischer*, 381 F.2d 509, 512 (CA2 1967); *United States v. Holder*, 412 F.2d 212, 215 (CA2 1969); *United States v. Virga*, 426 F.2d 1320, 1323 (CA2 1970) (*en banc*); *United States v. Brown*, 470 F.2d 285, 288 (CA2 1972); *United States v. Knupp*, 448 F.2d 412, 413 (CA4 1971); *United States v. Powell*, 487 F.2d 325, 329 (CA4 1973); *United States v. Johnson*, 495 F.2d 377, 378 (CA4 1974); *Smith v. United States*, 223 F.2d 750, 754 (CA5 1955), *rev'd on other grounds*, 360 U.S. 1 (1958); *United States v. Espinoza*, 481 F.2d 553, 557-558 (CA5 1973); *Stephan v. United States*, 133 F.2d 87, 100 (CA6 1943); *United States v. Calvert*, 523 F.2d 895, 913 (CA8 1975); *United States v. Bryant*, 442 F.2d 775, 778 (CADC 1971). *Cf. United States v. Solomon*, 422 F.2d 1110, 1120 (CA7 1970).

[3b]*See United States v. Picard*, 464 F.2d 215, 220 (CA1 1972) (to the extent the presentence report is relied upon in determining sentence, it must be made known to the defendant); *United States v. Janiec*, 464 F.2d 126, 127 (CA3 1972) (list of prior convictions must be disclosed to defendant or counsel if relied upon in any way); *Baker v. United States*, 388 F.2d 931, 933 (CA4 1968) (at a minimum, defendant must be apprised of convictions and charges of crime attributed to him in the presentence report); *United States v. Miller*, 495 F.2d 362, 364-365 (CA7 1974) (any grounds in the presentence report motivating sentence must be stated); *United States v. Isaac*, 442 F.2d 119, 120 (CADC 1970) (district court must state in writing the particular reason for a finding that specific portions of the presentence report should remain confidential; sealed copy of presentence report and of any undisclosed statement regarding the reasons for non-disclosure are to be transmitted to the court of appeals. *United States v. Bryant*, 442 F.2d 775, 778 (CADC 1971) (fact that discretion was exercised on an individual basis must appear on the face of the record).

(continued)

The movement from discretionary to mandatory disclosure of the presentence report was codified in the 1975 amendment to Rule 32(c).[4b] Disclosure of the

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(footnote continued from preceding page)

Although numerous decisions during the pre-1975 period did uphold denials of disclosure as within the sentencing court's exercise of discretion under Rule 32(c), *see, e.g., United States v. Alexander*, 498 F.2d 934 (CA2 1974); *United States v. Weiner*, 376 F.2d 42 (CA3 1967); *United States v. McKinney*, 450 F.2d 943 (CA4 1971); *United States v. Frontero*, 452 F.2d 406 (CA5 1971); *United States v. Jones*, 490 F.2d 207 (CA6 1974); *United States v. Dace*, 502 F.2d 897 (CA8 1974); *Fernandez v. Meier*, 432 F.2d 426 (CA9 1970); *Johnson v. United States*, 485 F.2d 240 (CA10 1973); *United States v. Delaney*, 442 F.2d 120 (CADC 1971), the only cases during this period to hold that the presentence report should never be disclosed are *United States v. Conway*, 296 F.Supp. 1284 (D.D.C. 1969) (although district judge stated that his policy was "to discuss significant aspects of a presentence report with defense counsel informally," *id.* at 1285), and *United States v. Durham*, 181 F.Supp. 503 (D.D.C. 1960) (presentence reports are confidential documents). The District of Columbia Circuit repudiated this position in *United States v. Queen*, 435 F.2d 66, 67 (CADC 1970) and *United States v. Bryant*, 442 F.2d 775, 777 (CADC 1971). *See also United States v. Brown*, 470 F.2d 285, 287-288 (CA2 1972).

[4b]The 1975 amendment, effective December 1, 1975, provides in subsection (3)(A):

> "Before imposing sentence the court shall upon request permit the defendant, or his counsel if he is so represented, to read the report of the presentence investigation exclusive of any recommendation as to sentence, but not to the extent that in the opinion of the court the report contains diagnostic opinion which might seriously disrupt a program of rehabilitation, sources of information obtained upon a promise of confidentiality, of any other information which, if disclosed, might result in harm, physical or otherwise, to the defendant or other persons; and the court shall afford the defendant or his counsel an opportunity to comment thereon and, at the discretion of the court, to introduce testimony or other information relating to any alleged factual inaccuracy contained in the presentence report."

presentence report is now obligatory subject to the power of the sentencing court to withhold portions that could seriously interfere with rehabilitation of the defendant, compromise confidentiality of sources, or create a risk of harm to the defendant or others.[5b] Rule 32(c) further provides that if the court elects not to disclose some portion of the report in reliance on one

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[5b]The Advisory Committee underscored its reasons for recommending that a mandatory disclosure procedure be adopted.

> "The Advisory Committee is of the view that accuracy of sentencing information is important not only to the defendant but also to effective correctional treatment of a convicted offender. The best way of insuring accuracy is disclosure with an opportunity for the defendant and counsel to point out to the court information thought by the defense to be inaccurate, incomplete, or otherwise misleading. Experience in jurisdictions which require disclosure does not lend support to the argument that disclosure will result in less complete presentence reports or the argument that sentencing procedures will become unnecessarily protracted. It is not intended that the probation officer would be subjected to any rigorous examination by defense counsel, or that he will even be sworn to testify. The proceedings may be very informal in nature unless the court orders a full hearing."

8A J. MOORE, MOORE'S FEDERAL PRACTICE–CRIMINAL RULES ¶32.01[5] (1975), at 32-13.

The report of the House Judiciary Committee similarly emphasized the importance of such a mandatory disclosure procedure.

> "The Committee added language to subdivision (c)(3)(A) that permits a defendant to offer testimony or information to rebut alleged factual inaccuracies in the presentence report. Since the presentence report is to be used by the court in imposing sentence and since the consequence of any significant inaccuracy can be very serious to the defendant, the Committee believes that it is essential that the presentence report be completely accurate in every material respect. The Committee's addition to subdivision (c)(3)(A) will help insure the accuracy of the presentence report." *(continued)*

of these limited exceptions, it must summarize the factual information contained in the undisclosed portion and must give the defendant or his counsel an opportunity to comment thereon.[6b]

(footnote continued from preceding page)

House Report No. 94-247, Federal Rules of Criminal Procedure Amendments Act of 1975 (House Judiciary Committee, 94th Cong., 1st Sess.) (1975) (2 U.S. CODE CONG. & ADMIN. NEWS 674, 690 (94th Cong., 1st Sess., 1975)).

[6b]Subsection (B) of Rule 32(c)(3) provides:

> "If the court is of the view that there is information in the presentence report which should not be disclosed under subdivision (c)(3)(A) of this rule, the court in lieu of making the report or part thereof available shall state orally or in writing a summary of the factual information contained therein to be relied on in determining sentence, and shall give the defendant or his counsel an opportunity to comment thereon. The statement may be made to the parties in camera."

IN THE

Supreme Court of the United States

OCTOBER TERM, 1976

No. 74-6593

DANIEL WILBUR GARDNER,

Petitioner,

against

STATE OF FLORIDA,

Respondent.

ON WRIT OF CERTIORARI TO THE
SUPREME COURT OF FLORIDA

BRIEF FOR RESPONDENT

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PRELIMINARY STATEMENT

All references to the appendix will be made by use of the prefix "A" followed by appropriate page number. References to the original transcript of trial testimony

will be made by use of the symbol "Tr." followed by appropriate volume and page number.

Opinion Below

The opinion of the Supreme Court of Florida affirming petitioner's conviction of first degree murder and sentence of death by electrocution is reported at 313 So.2d 675 (A 149-156). The findings of fact made by the trial judge in support of the imposition of the death sentence and the judgment and sentence of the Circuit Court of the Fifth Judicial Circuit of Florida, in and for Citrus County, adjudicating petitioner guilty and sentencing him to death appear at A 138-140.

Jurisdiction

The judgment of the Supreme Court of Florida was entered on February 26, 1975

(A 149). The petition for certiorari was filed on May 24, 1975 and was granted on July 6, 1976 (A 157). The jurisdiction of this Court rests on 28 U.S.C. §1257(3).

Constitutional and Statutory Provisions Involved

This case involves the Sixth Amendment to the Constitution of the United States, which provides:

> "In all criminal prosecutions, the accused shall enjoy the right...to have the Assistance of Counsel for his defence."

It also involves the Due Process Clause of the Fourteenth Amendment.

It further involves the following provisions of the statutes and rules of Criminal Procedure of the State of Florida.

> Section 775.082, Florida Statutes, 1975.
>
> Section 782.04, Florida Statutes, 1975.

Section 921.141, Florida Statutes, 1975

Florida Rule of Criminal Procedure 3.710.

Florida Rule of Criminal Procedure 3.711.

Florida Rule of Criminal Procedure 3.712.

Florida Rule of Criminal Procedure 3.713

Question Presented

Whether nondisclosure of a "confidential" portion of a presentence investigation report to a defendant convicted of a capital crime constitutes a denial of the effective assistance of counsel guaranteed by the Sixth and Fourteenth Amendments to the Constitution of the United States, and of the right to a fair hearing as guaranteed by the Due Process Clause of the Fourteenth Amendment, in a case where the trial judge declines to accept a jury recommendation of a life sentence and instead imposes the death sentence partially on the basis of the presentence report?

Statement of the Facts

Glenda Mae Demney, presently residing in Tampa, Florida, suffered a traumatic experience on June 29, 30, 1973. On that date, she was living in Homosassa, Florida. She lived in a trailer right beside her daughter, Bertha Mae Gardner, and her husband, petitioner, Daniel Wilbur Gardner (R Vol.II, pp. 166, 167). Glenda Mae saw her daughter around 7:00 o'clock on June 29, 1973 (R Vol.II, p. 168). Later, after dark, Glenda Mae and Bertha Mae took Bertha Mae's children to the home of Glenda Mae's youngest son. Glenda Mae and Bertha Mae then went on to the Sugar Mill, a local tavern. Glenda Mae let her daughter out at the Sugar Mill and then went back home (R Vol.II, pp. 169, 170). Later Glenda Mae saw Bertha again when Bertha came to her trailer and said she was

out of cigarettes. This was about 10 or 10:30 p.m., and Bertha remarked that she was going to look for her husband, petitioner Gardner. As far as Glenda Mae knew Bertha had not had anything of an alcoholic nature to drink (R Vol.II, p. 171). On that particular evening, Glenda Mae was keeping company with Calvin Loenacker, more popularly known as Buckshot. Later in the evening or perhaps in the early morning hours, Glenda Mae and Buckshot were in her trailer. She was fixing her lunch for the next morning and sipping along on a beer. All of a sudden, the door, hinges and all, came off and her son-in-law, Daniel Wilbur Gardner petitioner was behind it. He hit Glenda Mae on the side of the face, and she was knocked out (R Vol.II, p. 172). The next morning, Glenda Mae was fixing

some coffee when her son-in-law came over again and said that her daughter, Bertha Mae, wasn't breathing right (R Vol.II, p. 174). Glenda Mae went next door and saw her daughter naked on a bed with bruises on her face. Glenda Mae didn't know if Bertha was unconscious or not. But as far as she could determine, her son-in-law was not drinking that morning and he did not appear to be intoxicated. She stated that he had been drinking the night before when he came to her trailer and struck her but he was not drunk (R Vol.II, pp. 175, 176). No question about it, Glenda Mae flatly denied a contention that her son-in-law came to her house, knocked on the door and inquired about the whereabouts of his children. Glenda Mae further denied that she slammed the door in her son-in-law's face, that he

then kicked the door and it flew open and hit her and knocked her down (R Vol. II, p. 182). Glenda Mae remarked again that her son-in-law knocked her out with his fist and kicked her in the end of her spine "and the door didn't do that." (R Vol.II, p. 183).

Alva Loenecker was a commercial fisherman and long time friend of petitioner Gardner and his wife (R Vol.II, p. 185). He was at Glenda Mae's house on June 29, 1973 drinking some whiskey. At about 11 or 11:30 p.m., petitioner Gardner came over, drug the door off the trailer, came in and hit Glenda Mae and knocked her out on the floor (R Vol.II, p. 186). Buckshot asked him not to do that any more. Petitioner Gardner remarked that he was going back and beat hell out of his wife. Buckshot saw Bertha Mae at the door of

her trailer, and then gesturing, said that petitioner was pulling her head down at which time Bertha said, "please don't hit me any more." (R Vol.II, p. 187) Approximately 35 minutes later, petitioner Gardner returned to the trailer where Glenda Mae and Buckshot were. Petitioner wanted to jump on Glenda Mae again but Buckshot apparently talked him out of it. Nothing was mentioned concerning the whereabouts of petitioner's children (R Vol.II, p. 188). The next morning, petitioner came to the trailer, called Buckshot and said something was wrong with his wife, Bertha Mae (R Vol.II, p. 189). Glenda Mae got up and she and Buckshot went to petitioner's trailer. On entering the trailer, Buckshot saw Bertha Mae and petitioner remarked that he couldn't understand why his wife didn't wake up.

Buckshot said that Bertha Mae looked like she was dead. Petitioner asked him to go call the ambulance (R Vol.II, p. 190).

Nellie Merkerson is the mother of petitioner. She saw Buckshot on the morning of June 30, 1973 and as a result went to the trailer where her son and his wife were living (R Vol.II, p. 196). On arrival at the trailer, she asked her son what had he done, and he denied having done anything at all (R Vol.II, p. 197). After this, Nellie went back to her house, called her daughter-in-law and asked her to call the ambulance. Nellie then returned to her son's trailer and when she saw what had happened and asked her son about it, he said, "She wouldn't tell me where my babies are and I tried to get her to tell me and she wouldn't so I kept on beating her."

(R Vol.II, pp. 198, 199)

David Merkerson is the half-brother of petitioner (R Vol.II, p. 200). David lived about 150 feet from the trailer where petitioner and his wife lived. He went to their trailer on the morning of June 30, 1973. His mother, Nellie Merkerson, his wife Susan, and Bertha's mother, Glenda Mae, were there (R Vol.III, p. 201). Buckshot was outside. When David Merkerson saw Bertha Mae, she was on the bed and "she was dead." A sheet had been pulled up all the way to her neck (R Vol. II, p. 202). David was present when petitioner was placed in the patrol car (R Vol. III, p. 203). At that time, petitioner remarked to him, "Dave, I guess I really did it this time." David answered, "Yes, I guess you did." (R Vol.III, p. 204)

Susan Merkerson is the aunt of petitioner. She lived less than one-half block from where petitioner and his wife lived. Her rest was disturbed at approximately 11:30 p.m. on June 29, 1973 when she was awakened by noises emanating from petitioner's trailer which sounded like someone was bumping or moving furniture around (R Vol.III, p. 206).

Walter Owezarek is an emergency medical technician and on the morning of June 30, 1973 went to the residence of Daniel Wilbur Gardner and Bertha Mae Gardner (R Vol. III, p. 207). Upon arrival, Walter asked where the patient was (R Vol.III, p. 208). Petitioner pointed to a room. Walter saw a woman lying on a bed and examined her but found no vital signs. He looked at her entire body and saw a gigantic hematosa in the pelvic area (R Vol.III, pp. 209, 210).

The woman had been so badly bruised that Walter inquired from the petitioner as to how it happened. Petitioner remarked that his wife probably went out and got some drugs and when she came back she told petitioner to hit her and that he constantly kept pounding on her. When Walter heard this, he called the Sheriff's Department and they all stood by and waited for the officers to arrive (R Vol.III, p. 211). Later after receiving permission from the law enforcement officers, Walter and the ambulance driver removed the body to the Citrus Memorial Hospital (R Vol.III, p. 215).

Lloyd Shelton had been employed as a deputy sheriff of Citrus County, Florida, for approximately 8-1/2 years. On June 30, 1973, he had occasion to go to the residence of petitioner Gardner at

approximately 7:00 a.m. (R Vol.III, p. 216). He had known petitioner and his wife prior to this occasion (R Vol.III, p. 217). When he looked at the nude body which had been beaten and bruised, there wasn't any sign of life. He touched the leg just below the knee, and it was cold. He radioed the sheriff's office to send Deputy Williams and for them to call Mr. Green to come to the scene (R Vol.III, p. 218). Deputy Shelton took a lot of photographs inside the premises (R Vol. III, p. 219). Deputy Shelton turned all the evidence over to Deputy George Hanstein (R Vol.III, pp. 230, 231). Later when Deputy Shelton arrested petitioner, he advised him of his constitutional rights, commonly known as Miranda warnings (R Vol.III, p. 239). After Deputy Shelton put petitioner in the car and they

were driving along, petitioner remarked, "Why would a man do something like that" --"why would I do something like that." Petitioner also commented that his wife had been running around with other people and "that thing has been eating on me,-- it was just more than I could stand." (R Vol.III, p. 240) Petitioner gave a statement to Deputy Shelton and basically in the statement said that he and his wife got into a fuss after they got home and he beat her. Then she got up and took a bath and when she came back to bed, he beat her some more. And then he went to sleep and didn't wake up until the next morning (R Vol.III, p. 243).

David Chancey first saw the body of Bertha Mae at the Citrus Memorial Hospital. He took the body from Citrus Memorial to the Leesburg General Hospital.

No one was with him when he transported the body (R Vol.III, pp. 244, 245). He identified a photograph of the body (State's Exhibit No. 6) as being a photograph of the body he transported.

George Hanstein was a deputy sheriff in Citrus County, Florida. He received three packages from Deputy Shelton which he initialled and processed them for turning over to the Florida Crime Lab in Sanford, Florida. Counsel for the respective parties stipulated to this fact (R Vol.III, pp. 249, 250).

Dr. William H. Shutze is a medical doctor specializing in pathology. Counsel for petitioner at trial had no objection to his qualification as a pathologist licensed to practice in the State of Florida (R Vol.III, pp. 252, 253). Dr. Shutze identified State's Exhibit No. 6

as being a photograph of a body upon which he performed an autopsy on July 2, 1973 at the Leesburg General Hospital. He ascertained that the name of the body of the deceased was Bertha Mae Gardner. This was done from a name tag on the body (R Vol.III, p. 255). Dr. Shutze described the condition of the body and stated that there were at least 100 bruises thereon (R Vol.III, p. 256). And as a result of one injury, it was his opinion that something like a broomstick, bat, or bottle had been placed in the vagina (R Vol.III, p. 257). Dr. Shutze estimated that the wounds were perpetrated upon the body of the deceased by combination of instrument, fists, stomping, and rolling on the floor (R Vol.III, p. 258). The cause of death was a result of a combination of a loss of blood from a large tear in the liver

and from the fracture of the pubic bone (R Vol.III, p. 259). He estimated that the deceased weighed 90 pounds (R Vol. III, p. 260). On examining the body of the deceased, it was determined that large patches of hair were missing that were not of a diseased nature. Rather, the hair loss resulted from same being pulled out (R Vol.III, p. 261). When counsel for petitioner questioned Dr. Shutze, there was quite a hassle over the identity of the body upon which the doctor performed the autopsy. In fact, counsel for petitioner moved to strike all of the doctor's testimony because he could not positively identify the body upon which he performed the autopsy as being the body of Bertha Mae Garnder (R Vol.III, pp. 262-264). A blood alcohol test was performed with a result of

.19 grams percent which Dr. Shutze interpreted as indicating mild tc moderate intoxication (R Vol.III, p. 267).

Chandler Smith worked in the Sanford Crime Lab as a criminalist examiner (R Vol.III, pp. 268, 269). He was qualified as an expert without objection. He testified as to tests performed by him upon certain exhibits and the results thereof (R Vol.III, pp. 270-275).

The petitioner, Daniel Wilbur Gardner, did not take the stand to testify in his own behalf. (A 27-84)

Summary of Argument

Petitioner received a fair trial, and the exercise of a reasoned discretion by the trial judge in the sentencing proceeding does not violate the Due Process Clause of the Fourteenth Amendment. Fail-

ure to disclose a confidential portion of the presentence report did not deny petitioner the effective assistance of counsel nor deny him a fair hearing as guaranteed by the Due Process Clause of the Fourteenth Amendment.

First, for an investigator to get information, especially of an intimate nature, he must be able to give a firm assurance of confidentiality. Mandatory disclosure would immediately dry up sources of information that would otherwise be available to an investigator. People do not want to get involved. When they learn that the supplying of information can result in having to go to court or a neighborhood feud, they will no longer share their knowledge and impressions.

Secondly, mandatory disclosure would interminably delay the proceedings. A

defendant would, and understandably so, challenge everything in the report, thus transforming the sentencing process into a much more lengthy affair then it has to be. If a court must permit controversy with resultant hearings over each part of a presentence report, this would defeat the very purpose of the report by extending the process to such an extent that it would no longer be a practical tool for the aid of the court in the sentencing process.

Thirdly, mandatory disclosure of parts of the presentence report would be harmful to the rehabilitative efforts of a defendant. For example, a psychiatrist would hardly reveal his complete diagnosis of a patient at the beginning of their relationship. Similarly, and particularly if a defendant is to be supervised on pro-

bation by the same officer who compiled the report, it can impede the defendant's progress from the beginning if complete disclosure is made.

Finnally, it is not unfair to a defendant to proceed against him in this manner. There is no longer the scrupulous need for trial-type hearings with full disclosure and confrontation that properly governs a guilt-innocence determination. The reasoned exercise of discretion by the trial judge in evaluating the confidential portion of a presentence report can be trusted and constitutes an adequate safeguard of the interests of both the defendant and society.

ARGUMENT

A. THE SENTENCING PROCEEDINGS MET THE REQUIREMENTS OF DUE PROCESS AND PETITIONER RECEIVED THE EFFECTIVE ASSISTANCE OF COUNSEL.

Sub judice, the Findings of Fact submitted by the trial judge (A 138) in support of the death sentence proves conclusively that no mitigating circumstances were ignored. A separate and plenary hearing was conducted on the penalty issue as required by Section 921.141(1), Florida Statutes. The jury was correctly instructed as to their duty in this second phase of the trial (A 121), and then the trial judge reread the entire jury instructions to them (A 124). Petitioner made no request for any additional instructions or for any corrections to be made to the instructions as given in this

phase of the trial (A 125, 126). Petitioner was given ample opportunity to present anything he desired for consideration by the jury as a mitigating circumstance. No request was made for the sentencing phase to be continued for the purpose of securing mitigating testimony. Petitioner did not argue in his brief filed in the court below that other mitigating testimony should have been presented to the jury (and the judge) but that he was unable to do so because of lack of time.

The record shows that the jury returned its verdict of guilt on January 10, 1974 (A 106). The second phase or sentencing proceeding was immediately begun and the jury's Advisory Sentence was returned on the same date, January 10, 1974 (A 126). However, the trial judge's Findings of

Fact were not filed until January 30, 1974, and the death sentence was imposed on the same day (A 138-140). Simple arithmetic shows that the trial judge had a period of twenty days within which to mull over, cogitate on, consider, and weigh all of the testimony adduced at the trial and at the sentencing proceeding. Certainly, it cannot be successfully urged that the trial judge was in any haste or in any way eager to impose the death penalty. Rather, this was done after an ample period of reflection and consideration of everything that had transpired and should not be disturbed by this Court.

B. PETITIONER WAS NOT DENIED A FAIR HEARING OR THE EFFECTIVE ASSISTANCE OF COUNSEL BECAUSE OF NONDISCLOSURE OF THE FULL PRESENTENCE REPORT.

It must be admitted that the question

of disclosure vel non of the presentence report to parties has generated much heated debate in the literature. See, *e.g.*, Lorensen, *The Disclosure to Defense of Presentence Reports in West Virginia*, 69 W.Va.L.Rev. 159 (1967); Guzman, *Defendant's Access to Presentence Reports in Federal Criminal Courts*, 52 Iowa L.Rev. 161 (1966); Roche, *The position for Confidentiality of the Presentence Investigation Report*, 29 Albany L.Rev. 206; Higgins, *In Response to Roche*, 29 Albany L. Rev. 225 (1965); Higgins, *Confidentiality of Presentence Reports*, 28 Albany L. Rev. 12 (1964); Parsons, *The Presentence Investigative Report Must be Preserved as a Confidential Document*, Fed.Prob., March 1964, p. 3; Thomsen, *Confidentiality of the Presentence Report: A Middle Position*, Fed. Prob., March 1964, p. 8; *Symposium on Dis-*

covery in Federal Criminal Cases, 33 F.R.D 47, 122-28 (1963); Sharp, *The Confidential Nature of Presentence Reports*, 5 Catholic U.L. Rev. 127 (1955); Rubin, *What Privacy for Presentence Reports*, Fed. Prob., Dec. 1952, p. 8; Note, *Right of Criminal Offenders to Challenge Reports Used in Determining Sentence*, 49 Colum.L.Rev. 567 (1949); Hincks, *In Opposition to Rule 34(c)(2), Proposed Federal Rules of Criminal Procedure*, Fed.Prob., Oct.-Dec. 1944, p. 3. There is also a division among statutes on the point. Most maintain a position of silence which is usually interpreted as placing disclosure within the discretion of the sentencing court. Illustrative of this position is Florida Rule of Criminal Procedure 3.713(a) providing that the trial judge "may disclose" any of the contents of the presentence

investigation. It is emphasized that there have been numerous proposals in an effort to draw an acceptable line of demarcation between complete disclosure and complete secrecy. The President's Crime Commission recommended, for example, that "in the absence of compelling reasons for nondisclosure of special information, the defendant and his counsel should be permitted to examine the entire presentence report." President's Comm'n, The Challenge of Crime 145. See also President's Comm'n, The Courts 20. Other proposals have often proceeded from the view that what the defendant needs is not the whole report, but merely the facts on which it is based. Sources of information, together with opinions of the probation officer, properly can remain a privileged communication between officer

and judge. See, *e.g.*, Higgins, *Confidentiality of Presentence Reports*, 28 Albany L.Rev. 12 (1964). There are real advantages in a truly confidential report immune from disclosure to the defendant or his counsel. A presentence report, being designed as an aid to the judge, will contain an intimate character sketch of the defendant. In the State of Florida where the reports, at least parts thereof, have been held confidential, they have attained a quality which makes them far more reliable and hence more useful to the judge. No one will deny that in formulating a sentence, a judge needs as accurate an estimate as possible of the character of the defendant. The best source of information on a man's life is his family, if he has one. If the investigating officer can tell the members of the family that any information

they give will be held confidential, the chances are he can get a more accurate picture of the defendant's family life for his report. But if the defendant has been a bad provider and a bad influence on the children, in many cases, the wife will understandably hesitate to disclose the information if she knows that it will subsequently be brought to her husband's attention.

Another very useful source of information includes the defendant's employers. If employers, as a result of full disclosure of the presentence reports, learn that their cooperation in disclosing information to the investigating officer will result in subpoenas to appear and testify on contested issues at hearings on a sentence, this Court can believe that their cooperative attitude will soon

be destroyed. The net result will be that a valuable source of information about the defendant no longer will be available for the presentence report as an aid to the judge in formulating a sentence.

Then, too, the requirement of disclosure seems particularly unfortunate when a defendant is a gangster with dangerous associates. It is neither fair nor sensible for any person who can give useful information on the character of such defendants to be subjected to the hazard of retaliation which well may flow from the disclosure of confidential data.

Frequently, presentence reports will include testimony from neighbors and members of the community. Such information constitutes hearsay and there is perhaps a certain minimal degree of logic in say-

ing the considerations of fairness require that the defendant be given an opportunity to dispute and cross examine any unfavorable testimony gathered by the investigator. But it is the position of respondent that the character and official position of the investigating officer is a better guaranty against unfair prejudice than the opportunity for partisan counsel to verify and cross examine. Probation officers in the preparation of presentence reports are on the alert to discard or discount character evidence motivated by spite or prejudice. Unreliable testimony is either wholly excluded or, if included, accompanied by sufficient warning to put the judge on notice. In this way, the judge has the benefit of information apparently trustworthy and can make his own estimate of the reliabil-

ity of questionable information, just as well as though the objection were raised by defense counsel.

Should this Court determine that full disclosure is constitutionally required, then it can look forward to delays in the imposition of sentence in the trial courts. This is so because defense counsel can urge, and properly so, that the only reason for the rule was to afford opportunity for an independent investigation of certain material found therein and can then protest in all sincerity that their pressing trial engagements will prevent them from promptly undertaking the investigation of the subject matter. And the trial judge will be saddled with an added dilemma: He will be accused of frustrating the rule of disclosure unless he affords defense counsel reasonable opportunity to

verify the report without interference with his court assignments elsewhere. The inevitable result is that the offender whose lawyer is most in demand will have the greater success in delaying the day of sentence.

Respondent's constitutional contention is simply stated: The Sixth and Fourteenth Amendments do not forbid the imposition of a death sentence after consideration of confidential matters in a presentence report that have not been disclosed to the parties. The decision of this Court in *Williams v. New York*, 337 U.S. 241 (1949), has long been recognized as the complete and final word in support of nondisclosure. In *Williams*, this Court reviewed a decision of the New York Court of Appeals and by a majority opinion upheld a conviction of first degree murder. The jury had recommended life imprisonment for the

slaying of a young girl in Brooklyn. The trial judge, relying upon a probation investigation report as a basis for ignoring the jury recommendation, imposed the death penalty. This Court held that the trial judge had full power to rely upon a probation investigation report and this notwithstanding the defendant's contention that his constitutional rights had been violated because he had not had access to the report and the right to confrontation and rebuttal. This Court pointedly remarked that the imposition of the death sentence would not alter the principles of nondisclosure, remarking that:

> "We cannot say that the due process clause renders a sentence void merely because a judge gets additional out-of-court information to assist him in this awesome power of imposing the death sentence." *Id.* at 252.

The opinion of this Court authored by Mr. Justice Black contains many noteworthy statements expounding the philosophy of probation acceptable to this Court which is appropriately related to an understanding and appreciation of the issue at hand. This Court recognized that *Williams* presented serious and difficult questions as to the constitutional rights of a defendant at sentencing as well as the rules of evidence applicable to the manner in which a judge might obtain information to assist him in the disposition of a convicted offender. Following references to the need of rigid rules of evidence in a trial to determine the issue of guilt, the court then significantly pointed out:

> "A sentencing judge, however, is not confined to the narrow issue of guilt. His task within fixed statutory and constitutional limits is to determine the type and extent of punishment

> after the issue of guilt has been determined. Highly relevant--if not essential--to his selection of an appropriate sentence is the possession of the fullest information possible concerning the defendant's life and characteristics. And modern concepts individualizing punishment have made it all the more necessary that the sentencing judge not be denied an opportunity to obtain pertinent information by a requirement of rigid adherence to restrictive rules of evidence properly applicable to the trial."
> *Id.* at 247.

The Court then made appropriate references to the modern changes in the treatment of offenders which make it more necessary than in years past for observation of the distinctions in the evidential procedure in the trial and sentencing process. The expanding use of the indeterminate sentence, and of probation itself, are examples of procedures resulting in an increase in the discretionary powers employed in determing punishment. The Court then

indicated its appreciation of the fact that such procedures give rise to the need for the fullest information possible concerning the defendant's life and characteristics as an aid in the selection of the most appropriate sentence. The Court noted that:

> "The considerations we have set out admonish us against treating the due process clause as a uniform command that courts throughout the Nation abandon their age-old practice of seeking information from out-of-court sources to guide their judgment toward a more enlightened and just sentence.... *The due process clause should not be treated as a device for freezing the evidential procedure of sentencing in the mold of trial procedure. So to treat the due process clause would hinder--if not preclude--all courts, state and federal, from making progressive efforts to improve the administration of criminal justice."* (Emphasis supplied.) *Id.* at 250.

It may be argued that the decision in *Williams* did not go to the crux of the

matter of determining whether or not a defendant has a right to examine the presentence report. This argument ignores what the decision in *Williams* represents. It unmistakably represents that the use of confidential information by a trial judge in the imposition of a death sentence violates no constitutional right of a defendant.

If the decision of this Court in *Williams* is distasteful to the proponents of full disclosure, then surely the decision of Judge Holtzoff in *United States v. Durham*, 181 F.Supp. 503 (D.D.C. 1960), cert. denied 364 U.S. 854 (1960), will be even less palatable to them.

> "It is not the practice to permit the defendant or his counsel or anyone else to inspect reports of presentence investigations. Such reports are treated as confidential documents.... In fact, it has been the traditional prac-

> tice even before the system of presentence investigation was introduced for the court to receive information in confidence, which the court might or might not disclose to the defendant, as the court saw fit, that might bear upon the question of what sentence should be imposed. The custom of treating reports as confidential documents is merely a continuation of that prior practice." *Id.* at 503, 504.

The basis of Judge Holtzoff's decision was, of course, this Court's decision in *Williams*. See Footnote 1 appended to the *Durham* decision.

Eight years later in 1968, Judge Carter in *Hancock Brothers, Inc. v. Jones*, 293 F.Supp. 1229 (D.C.N.D. Cal. 1968), held that presentencing memoranda prepared in connection with sentencing of defendants in a criminal proceeding under the Clayton Act should not be made a matter of public record and disclosure

would not be compelled. Note the following:

> "If the confidential nature of a probation report is not protected, a serious curtailment could result in information now made available to sentencing judges. Hoover v. United States, 268 F.2d 787 (10th Cir. 1959); United States v. Durham, 181 F.Supp. 503 (D.C. 1960), cert. den. 364 U.S. 854, 81 S.Ct. 83, 5 L.Ed. 77 (1960); United States v. Greathouse, 188 F.Supp. 765 (Ala. 1960); Dillon v. United States, 307 F.2d 445 (9th Cir. 1962) (Barnes, J., dissenting; Barnet and Gronewold, Confidentiality of the Pre-sentence Report, 26 Fed.Prob. 26 (1962). 'To deprive sentencing judges of this kind of information would undermine modern penalogical procedural policies that have been cautiously adopted throughout the nation after careful consideration and experimentation.' Williams v. People of State of New York, 337 U.S. 241, 249-250, 69 S.Ct. 1079, 1084, 93 L.Ed. 1337 (1949)." *Id.* at 1232, 1233.

In the case of *Hoover v. United States*, 268 F.2d 787 (10th Cir. 1959), the sentence was attacked on the ground that the

presentence report contained many inaccurate and untrue statements and that the defendant was given no opportunity to contradict or rebut them. In disposing of this attack, Chief Judge Bratton, writing for a unanimous court, commented as follows:

> "One further challenge to the judgment and sentence was that the probation service made a presentence investigation and report in the case; that the report contained many inaccurate, untrue, and prejudicial statements; that it was an ex parte investigation; that appellant was not given any opportunity to contradict or rebut the inaccurate, untrue, and prejudicial statements; that they prejudiced the court against appellant; and that in such manner he was denied due process. Rule of Criminal Procedure 32(c)(1), 18 U.S.C., provides that the probation service of the court shall make a presentence investigation and report to the court before the imposition of sentence or the granting of probation unless the court directs otherwise; and Rule 32(c)(2) provides in presently pertinent part that the presentence investigation shall contain such information concerning the circumstances affecting the behavior of

> the defendant as may be helpful in imposing sentence. The presentence investigation was made and the report submitted pursuant to the rule. And the action of the court in taking into consideration and giving appropriate weight to the information obtained in that manner in determining the kind and extent of punishment to be imposed upon appellant within the limits fixed by law, without affording appellant an opportunity to contradict or rebut statements contained in the report, did not violate due process. Williams v. People of State of New York, 337 U.S. 241, 69 S.Ct. 1079, 93 L.Ed. 1337." *Id.* at 790.

In the case of *Specht v. Patterson*, 386 U.S. 605 (1967), this Court had an opportunity to repudiate its holding in *Williams* but declined to do so. In *Specht*, this Court condemned the procedure followed by a Colorado state court in sentencing the defendant under the Colorado Sex Offenders' Act to an indeterminate term of from one day to life. The defendant Specht was afforded no hearing

or right of confrontation for the purpose of determining the validity of the conclusions stated in the reports of the psychiatrists. This Court held that the failure to grant such procedural safeguards as a hearing and the right of confrontation violated the due process requirements of the Fourteenth Amendment. In determining the applicability of *Williams*, this Court remarked as follows:

> "We adhere to Williams v. New York, supra; but we decline the invitation to extend it to this radically different situation." *Id.* at 329.

The decision in *Baker v. United States*, 388 F.2d 931 (4th Cir. 1968), is informative. Although there, the sentence was vacated and the cause remanded because of the unusual factual situation, the comments of the Court on the issue of nondisclosure are interesting. Note the following:

> "Fixed practices aside, we must observe that there is no obligation upon the Court to divulge, or any right in the defendant to see, the entire report at any time. See Williams v. State of Oklahoma, 358 U.S. 576, 79 S.Ct. 421, 3 L.Ed.2d 516 (1959); Williams v. People of State of New York, 337 U.S. 241, 69 S.Ct. 1079, 93 L.Ed. 1337 (1949); F.R.Crim.P. 32(c)(2), supra. Indeed, there could be danger in delivering it to the defendant or his attorney for scrutiny. It could defeat the object of the report--to acquaint the court with the defendant's background as a sentencing guide--by drying up the source of such information. See United States v. Fischer, 381 F.2d 509 (2 Cir. July 24, 1967). To illustrate, the probation officer could be deprived of the confidence of trustworthy and logical informants--persons close to the accused--if they knew they could be confronted by the defendant with their statements. The investigation would then amount to no more than a repetition of the public records--so limited a function as to obviate the need of a probation officer.

* * *

"Of course, the defendant's general conduct and behavior, as well as his reputation in the community in regard to honesty, rectitude and fulfillment of his civic and domestic responsibilities, may be treated in the report. Whether any of such commentary should be released will remain in the discretion of the District Judge. Names of informants, as well as intimate observations readily traceable by the defendant, ordinarily should be withheld lest, to repeat, disclosure cut off the investigator from access to knowledge highly valuable to the sentencing court. It is to be expected of the judge, however, that he winnow substance from gossip." *Id.* at 933, 934.

As recently as 1975, the Fifth Circuit Court of Appeals had occasion to pass on the disclosure issue. There the appellants contended that the District Court erred in denying them access to presentence reports. The record did not disclose what, if any, information in the reports was relied upon by the trial judge. However, appellants urged that the nondisclosure was significant in light

of the disparity of sentences imposed on the two defendants. In rejecting this argument, the Fifth Circuit in *United States v. Horsley*, 519 F.2d 1264 (5th Cir. 1975), remarked as follows:

> "This Circuit has repeatedly held that the decision whether or not to disclose part or all of a presentence report submitted pursuant to Federal Rule of Criminal Procedure 32(c)(2) lies within the discretion of the trial judge. United States v. Arenas-Granada, 5 Cir., 1973, 487 F.2d 858, 859 (per curiam); United States v. Thomas, 5 Cir., 1970, 435 F.2d 1303 (per curiam); United States v. Chapman, 5 Cir., 1969, 420 F.2d 925, 926; Good v. United States, 5 Cir., 1969, 410 F.2d 1217, 1221; United States v. Bakewell, 5 Cir., 1970, 430 F.2d 721, 722 (per curiam). We have also held that even where some errors in the presentence report have come to light and been corrected, the trial judge may properly refuse to disclose the remainder of the report to the defendant for purposes of ascertaining whether further mistakes have been made. United States v. Jones, 5 Cir., 1973, 473 F.2d 293, cert. denied, 411 U.S. 934, 93 S.Ct. 2280, 36 L.Ed.2d 961.

* * *

"The leading Supreme Court case regarding access to presentence reports, Williams v. New York, 337 U.S. 241, 69 S.Ct. 1079, 93 L.Ed. 1337 (1949), has not been overruled. In Williams, the Court sustained a death sentence imposed on the basis of a presentence report, despite a jury recommendation of a life sentence. The Court held that the due process clause does not require that a sentence be based on information received in open court, noting that much of the information relied upon by judges in presentence reports would be unavailable if it were restricted to that given in open court by witnesses subject to cross-examination." *Id.* at 1266, 1267.

The use of a presentence report is an integral part of Florida's sentencing procedure. In *Proffitt v. State of Florida*, ____U.S._____, 49 L.Ed.2d 913, 96 S.Ct._____(1976), this Court put its unmistakable stamp of approval on Florida's capital-sentencing procedures.

"The Florida capital-sentencing procedures thus seek to assure that the death penalty will not be imposed in an arbitrary or

capricious manner. Moreover, to the extent that any risk to the contrary exists, it is minimized by Florida's appellate review system, under which the evidence of the aggravating and mitigating circumstances is reviewed and reweighed by the Supreme Court of Florida 'to determine independently whether the imposition of the ultimate penalty is warranted.' Songer v State, 322 So 2d 481, 484 (1975). See also Sullivan v. State, 303 So 2d 632, 637 (1974). The Supreme Court of Florida, like that of Georgia, has not hesitated to vacate a death sentence when it has determined that the sentence should not have been imposed. Indeed, it has vacated eight of the 21 death sentences that it has reviewed to date. See Taylor v State, 294 So 2d 648 (1974); LaMadline v. State, 303 So 2d 17 (1974); Slater v State, 316 So 2d 539 (1974); Swan v State, 322 So 2d 485 (1975); Tedder v State, 322 So 2d 908 (1975); Halliwell v. State, 323 So 2d 557 (1975); Thompson v State, 328 So 2d 1 (1976); Messer v State, 330 So 2d 137 (1976)." *Id.* at 49 L.Ed.2d 913 at 923.

Florida Rule of Criminal Procedure 3.713 is remarkably similar to Federal Rule of Criminal Procedure 32(c)(3). Subsection (a) of the Florida rule provides:

> "The trial judge may disclose any of the contents of the presentence investigation to the parties prior to sentencing. Any information so disclosed to one party shall be disclosed to the opposing party."

See also Subsections (b) and (c). The federal rule at Subsection (c)(3)(A) provides:

> "(A) Before imposing sentence the court shall upon request permit the defendant, or his counsel if he is so represented, to read the report of the presentence investigation exclusive of any recommendation as to sentence, *but not to the extent that in the opinion of the court the report contains diagnostic opinion which might seriously disrupt a program of rehabilitation, sources of information obtained upon a promise of confidentiality, or any other information which, if disclosed, might result in harm, physical or otherwise, to the defendant or other persons;* and the court shall afford the defendant or his counsel an opportunity to comment thereon and, at the discretion of the court, to introduce testimony or other information relating to any alleged factual inaccuracy contained in the presentence report." (Emphasis supplied.)

Thus, both rules permit the exercise of a reasoned discretion by the trial judge in the disclosure in determining the extent of disclosure of the contents of a presentence report. At this point, the words of Mr. Justice Adkins in writing the majority opinion in *State v. Dixon*, 283 So.2d 1 (Fla. 1973), come to mind.

> "Two points can, however, be gleaned from a careful reading of the nine separate opinions constituting Furman v. Georgia, supra. First, the opinion does not abolish capital punishment, as only two justices--Mr. Justice Brennan and Mr. Justice Marshall --adopted that extreme position. The second point is a corollary to the first, and one easily drawn. The mere presence of discretion in the sentencing procedure cannot render the procedure violative of Furman v. Georgia, supra; it was, rather, the quality of discretion and the manner in which it was applied that dictated the rule of law which constitutes Furman v. Georgia, supra.
>
> "Discretion and judgment are essential to the judicial process, and are present at all stages of its progression --arrest, arraignment, trial, verdict,

and onward through final appeal. Even after the final appeal is laid to rest, complete discretion remains in the executive branch of government to honor or reject a plea for clemency. See Fla. Const., art. IV, § 8, F.S.A., and U.S. Const., art. II, § 2.

"Thus, if the judicial discretion possible and necessary under Fla. Stat. § 921.141, F.S.A., can be shown to be reasonable and controlled, rather than capricious and discriminatory, the test of Furman v. Georgia, supra, has been met. What new test the Supreme Court of the United States might develop at a later date, it is not for this Court to suggest.

* * *

"Review by this Court guarantees that the reasons present in one case will reach a similar result to that reached under similar circumstances in another case. No longer will one man die and another live on the basis of race, or a woman live and a man die on the basis of sex. If a defendant is sentenced to die, this Court can review that case in light of the other decisions and determine whether or not the punishment is too great. Thus, the discretion charged in Furman v. Georgia, supra, can be controlled and channeled

until the sentencing process becomes a matter of reasoned judgment rather than an exercise in discretion at all." *Id.* at 6, 7, 10.

Much has been said and written on the issue of disclosure versus nondisclosure of the confidential portion of a presentence report. Petitioner's entire brief is based on the premise that because of the failure of the trial judge to *sua sponte* furnish counsel for both parties a copy of the confidential portion of the presentence report he has suffered a grievous denial of his constitutional rights. A reading of petitioner's brief conveys the unmistakable impression that the confidential portion of the presentence report contains gross inaccuracies, misrepresentations, and other distortions of the truth. It is urged that all of these terrible accusations could have been

rebutted and the truth of the matter shown if only petitioner and/or his counsel could have been furnished with a copy thereof. Therefore, respondent has secured a copy of the "Confidential Evaluation" which is the confidential portion of the presentence report that was furnished to the trial judge at the sentencing phase of petitioner's trial. It forms the appendix to this brief.

It is readily apparent that most, if not all, of the material found in the confidential portion is also contained in the non-confidential portion (A 133-137). The truth of the matter is there is nothing in the confidential portion that is not found in the non-confidential part of the presentence report. A fair appraisal of both the confidential and the non-confidential portions of the presentence report compels the conclusion that

failure to furnish a copy of the confidential portion to petitioner did not result in a denial of any of his constitutional rights.

CONCLUSION

The judgment of the Supreme Court of Florida should be affirmed.

Respectfully submitted,

Robert L. Shevin
Attorney General

By: _____
Wallace E. Allbritton
Assistant Attorney General

APPENDIX "A"

CONFIDENTIAL EVALUATION

Name Daniel Wilbur Gardner Dist. # 42

I. Offense: It is obvious that the subject has received a fair trial. He apparently was under heavy influence of alcohol, which was normal for him. Apparently, he beat his wife to an extreme on this occasion, which resulted in her death. It is possible that the subject did not remember what he did, due to the fact that he was highly intoxicated. He continually showed remorse for what happened, claimed that he did not remember, feels he should not be held responsible for something that he cannot remember.

II. Prior Arrests & Convictions: A check of the subject's record will indicate that he is a drinker, has been arrested several times for disorderly conduct, and fight-

ing. The charge in Ft. Myers on 7-20-60 for investigation of Aggravated Assault was not able to be verified, due to the fact that the time limit involved. It is noted that the records in Ft. Myers are quite sketchy about what happened. The subject volunteered the statement that this attack was the result of his first wife. He stated that they apparently had a fight and she went off with somebody to a trailer. He claims he went by the trailer and heard his wife telling the person to leave her alone. He stated he broke into the trailer, noticed a colored man sitting in the front parlor with no clothes on and his wife in the back room with a white man apparently fighting or arguing. He stated that he took out his knife and

told the colored man to get out of there, and went back to the bedroom he apparently claimed brushed past his wife and cut her with the knife and threatened the other man. He stated this all subsided when the States Attorney saw the disposition of the case and stated that the man had every right to defend his wife, so eventually the charge was dropped. The Other Assault charges on 4-2-70 and 4-21-72, were Assaults and Battery, both being on the subject's wife. It should be noted that these charges were dropped at the request of the wife.

III. Plan: Subject does have an adequate residence and employment plan in Homosassa, but it is felt that this subject is no fit candidate for Probation.

IV. Analysis: Before the Court is a 39

APPENDIX "A"

year old white male who was charged with and found guilty of Murder in the 1st degree.

This offense is the result of the subject apparently under the influence of alcohol, administering a severe beating, both with his hands and feet and objects. Apparently, beat his wife to death over no apparent reason.

This subject has resided most of his life in the Homosassa area, being considered the usual drinker and fighter. His younger life was spent mostly being shifted around from Mother to Boys Home. The subject was more or less to let run on his own, without any supervision. Subject was married twice, the second marriage being to the victim in this case.

APPENDIX "A"

It should be noted that this subject is a heavy drinker, which apparently has governed most of his life. Subject spent a short time in the Air Force, stating that he received a General Discharge under honorable conditions. He stated that he did spend some time in the brig, which was mostly due to drinking and disobeying orders. Subject does have a trade as a carpenter, but apparently only works when he feels too. Florida Power indicated that he had worked on and off for the past five years, but apparently was laid off, mostly due to his drinking. They noted that the subject was not working, two months prior to this incident.

Criminal Record: The subject does possess a fairly long record, most of it due to

drinking and fighting and Assault charges as a result of drinking. It should be noted that the subject in these charges has had at least three times when he has beat on his wife. The subject does possess an Assaultive nature and apparently is aggravated by drinking.

Most of the feelings in this case are against the subject. Police feel that he is an extremely poor candidate for Probation due to his drinking and fighting, also they feel that he should not be allowed on the streets, due to what he did to his wife.

It is the opinion of this supervisor that the jury in this case found a true verdict and the subject had a fair trial, that he would be an extremely poor candidate for

probation.

Respectfully Submitted,

Michael C. Dippolito,
District Supervisor

MCD/kb
1-28-74

Will not be Printed

IN THE

SUPREME COURT OF THE UNITED STATES

October Term, 1976

No. 74-6593

DANIEL WILBUR GARDNER,

Petitioner,

-v.-

STATE OF FLORIDA,

Respondent.

ON WRIT OF CERTIORARI TO THE SUPREME COURT OF FLORIDA

REPLY BRIEF FOR PETITIONER

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REPLY BRIEF FOR PETITIONER

The body of the Brief for Respondent requires no reply. Appendix "A" thereto requires only the reply that it is not properly before the Court.

Appendix "A" consists of a purported facsimile of "the confidential portion of the presentence report that was furnished to the trial judge at the sentencing phase of petitioner's trial." (Brief for Respondent, at p. 54.) For four independently sufficient reasons, the

Court should "decline to examine" it. Goldberg v. United States, 47 L.Ed.2d 603, 617 n.15 (1976).

First, the Court "must look only to the certified record in deciding questions presented." Lawn v. United States, 355 U.S. 339, 354 (1958). A document which is not in the record "[m]anifestly . . . cannot be properly considered . . . in the disposition of the case." Adickes v. S.H. Kress & Co., 398 U.S. 144, 157-158 n.16 (1970). This is true whether or not the document was "used at the hearing in the court below." Bassing v. Cady, 208 U.S. 386, 389 (1908). See, e.g., Ex parte Century Indemnity Co., 305 U.S. 354 (1938). The "rule is common to all courts exercising appellate jurisdiction, according to the course of the common law." Fisher v. Cockerell, 5 Pet. 248, 254 (1831). It has been followed by this Court from the beginning. See, e.g., Ray v. Law, 3 Cranch 179 (1805). In the present case, neither petitioner nor the Court can be assured that Appendix "A" to respondent's brief is an authentic and accurate copy of the undisclosed materials received by the sentencing judge. The question "whether [respondent's] . . . representations [to that effect] are true can be determined only upon a hearing in the [trial court]." Killian v. United States, 368 U.S. 231, 243 (1961).

Second, respondent's invitation to this Court to consider Appendix "A" in the first instance flouts both Florida's and the Eighth Amendment's requirements of procedural regularity for the imposition of a death sentence. Florida law imposes on the Florida Supreme Court the "separate responsibility to determine independently whether the imposition of the ultimate penalty is warranted," Songer v. State, 322 So.2d 481, 484 (Fla. 1975)(footnote omitted), upon review of "the total record," Swan v. State, 322 So.2d 485, 489 (Fla. 1975). "Review of a sentence of death by this Court, provided by Fla. Stat. §921.141, F.S.A., is the final step within the State judicial system. Again, the sole purpose of the step is to provide the convicted defendant with one final hearing before death is imposed." State v. Dixon, 283 So.2d 1, 8 (Fla. 1973). This Court, of course, emphasized the Dixon safeguard of automatic, plenary appellate review in sustaining the constitutionality of the Florida capital-punishment statute. Proffitt v. Florida, 49 L.Ed.2d 913, 922, 926-927 (1976) (plurality opinion). See also Gregg v. Georgia, 49 L.Ed.2d 859, 888, 892-893 (1976)(plurality opinion); Jurek v. Texas, 49 L.Ed.2d 929, 937, 941 (1976)(plurality opinion).

Yet the Court is now asked to affirm petitioner's condemnation on the basis of a document that the Florida

Supreme Court has never seen, produced by prestidigitation here following the allowance of certiorari. To do so would denigrate the functions of Florida's highest court in its own capital sentencing system and make an hypocrisy of "the need for reliability in the determination that death is the appropriate punishment in a specific case." Woodson v. North Carolina, 49 L.Ed.2d 944, 961 (1976)(plurality opinion). It would also represent a signal deviation from the principles of federalism which commit to the state courts the initial responsibility for administration of their own criminal laws. See, e.g., Younger v. Harris, 401 U.S. 37 (1971).

Third, there is no fair or proper method by which petitioner or the Court can use Appendix "A" for the first time at this stage of the proceedings. The function of a presentence investigation report is to inform and guide the sensitive exercise of discretion in making a choice among available sentences -- here, life or death. The reason for requiring its disclosure under the Sixth and Fourteenth Amendments is to assure the defendant an ample opportunity to be heard regarding all materials considered by the decision-maker before that decision is made.

This Court did not decide to override the trial jury's recommendation of mercy and sentence petitioner to die. It cannot know what influenced the one man who did. It also can-

not know the facts that would have been developed by defense investigation of the factual assertions contained within -- and only within -- the undisclosed portion of the PSI report. 1/ It therefore cannot know the significance

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1/ Respondent's brief asserts that "there is nothing in the confidential portion that is not found in the non-confidential part of the presentence report." (Brief for Respondent, at p. 54.) This is manifestly false even if the text of the confidential portion represented in Appendix "A" is authentic. The "Prior Arrests & Convictions" section of the PSI disclosed at trial, for example, says that two "Assault & Battery" arrests (in 1970 and 1972) were "Dismissed." Neither the identity of the complainant nor the ground of the dismissal of these charges is reported. (A. 135.) Appendix "A" recites that these assaults were "both . . . on the subject's wife" (Brief for Respondent, at p. 58), and proceeds to convict petitioner on the dismissed charges (he "has had at least three times when he has beat on his wife," id. at p. 61), so that the present offense can be summed up by saying "[a]pparently, he beat his wife to an extreme on this occasion" (id. at p. 56). The disclosed portion of the PSI report also notes an "Investigation of Aggravated Assault" arrest in 1960, with the notation "Released" and nothing more. (A. 135.) Appendix "A" notes that this charge "was not able to be verified, due to the fact that the time limit involved [sic]" (Brief for Respondent, at p. 57), but sets forth a 1½ page description of the matter based upon a "volunteered . . . statement" of petitioner to the probation officer who prepared the PSI (id. at pp. 57-58).

Under "Military," the disclosed portion of the PSI reports that petitioner enlisted in the Air Force and served for four years; it says, "Court Martials: None," and records a "General Discharge under honorable conditions." (A. 136.) Appendix "A" recites that petitioner "stated that he did spend some time in the brig, which was mostly due to drinking and disobeying orders." (Brief for Respondent, at p. 60.) Under "Employment," the disclosed portion of the PSI reports: "Subject stated at the time of this incidence [sic] he was unem-

[note 1 continued on following page]

that the sentencing judge would have given to those unknown facts. It cannot even know what significance he assigned to the comments that were contained in the undisclosed portion of the PSI report and thereby insulated against criticism, refutation, or explanation 2/ before he decided "whether this defendant was fit to live," Witherspoon v. Illinois, 391 U.S. 510, 521 n.20 (1968). Affirmance of a decision to take human

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footnote 1, continued/

ployed for approximately two months, but he did get money by doing odd jobs of carpentry around Homosassa. Prior to this he worked for Florida Power Corporation on and off for the past five years, as a carpenter." (A. 136.) The version in Appendix "A" is: "Subject does have a trade as a carpenter, but apparently only works when he feels too [sic]. Florida Power indicated that he had worked on and off for the past five years, but apparently was laid off, mostly due to his drinking." (Brief for Respondent, at p. 60.)

2/ As represented by respondent in Appendix "A," this portion of the report contains such comments as: "[m]ost of the feelings in this case are against the subject" (Brief for Respondent, at p. 61); "[t]his subject has resided most of his life in the Homosassa area, being considered the usual drinker and fighter" (id. at p. 59); and "Apparently, beat his wife to death over no apparent reason" (ibid.).

life should obviously not be rested upon speculation as to what petitioner or his trial counsel might or might not have responded, and how the sentencing judge might or might not then have reacted, if these materials had been disclosed prior to sentencing instead of after judgment.

Fourth, such speculation is not merely improper but impossible in a death case. Respondent's position, apparently, is that nondisclosure of the so-called "confidential" portion of the PSI 3/ was, at worst, harmless error. But "before a federal constitutional error can be held harmless, the court must be able to declare a belief that it was harmless beyond a reasonable doubt." Chapman v. California, 386 U.S. 18, 24 (1967). Where death has been decreed after proceedings infected by error, it has not been the practice of this Court lightly to dismiss reasonable doubts of harm. See, e.g., Hamilton v. Alabama, 368 U.S. 52, 55 (1961); Boykin v. Alabama, 395 U.S. 238 (1969). Other courts, of course, show the same solicitude, see, e.g., People v. Terry, 61 Cal.2d 137, 37 Cal. Rptr. 605, 390 P.2d 381, 392 (1964); People v. Johnson, 284 N.Y. 182, 30 N.E.2d 465, 466 (1940); People v. Crump, 5

3/ If Appendix "A" is to be believed, there is in fact nothing in the "confidential" portion of the PSI that was confidential in any other sense than that the judge (or the probation officer) decided that it should not be disclosed to petitioner.

Ill.2d 251, 125 N.E.2d 615, 625 (1955), and have for centuries, see 1 L. RADZINOWICZ, A HISTORY OF ENGLISH CRIMINAL LAW AND ITS ADMINISTRATION FROM 1750 83-106 (1948). Where error infects the capital sentencing process itself, the reason for this solicitude is not merely the enormity of what is at stake. It is also that a discretionary decision to take or spare life -- here, a decision to take life notwithstanding the advisory recommendation of the trial jury that petitioner's life should be spared -- always involves "the weighing of imponderables," Prevatte v. State, 233 Ga. 929, 214 S.E.2d 365, 368 (1975), so that the slightest and most unfathomable of influences may tip the delicate balance of life and death. See, e.g., Pait v. State, 112 So.2d 380, 385-386, 388-389 (Fla. 1959); People v. Hamilton, 60 Cal.2d 105, 32 Cal. Rptr. 4, 383 P.2d 412, 430-432 (1963); Stain v. State, 273 Ala. 262, 138 So.2d 703, 707 (1961).

Surely it is true of judges too, as the California Supreme Court has said of jurors, that "[t]he precise point which prompts the [death] penalty in the mind of [a capital sentencer] . . . is not known to us and may not even be known to him." People v. Hines, 61 Cal.2d 164, 37 Cal. Rptr. 622, 390 P.2d 398, 402 (1964). Can this Court say with confidence why the sentencing judge overrode the jury's recommendation of

life imprisonment and sentenced petitioner to death? If it cannot do so, it cannot conclude that nondisclosure of a portion of the PSI was harmless; and -- quite apart from the manifest impropriety of going outside the record -- respondent's invitation to the Court to make "[a] fair appraisal of both the confidential and the non-confidential portions of the presentence report" (Brief for Respondent, at p. 54)(emphasis added) is a contradiction in terms.

Respectfully submitted,

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